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Race Relations Law Reporter

**A Complete, Impartial
Presentation of Basic
Materials, Including:**

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments

. . . . A Summary

Education

The *Georgia* Supreme Court sustained a demurrer to an Atlanta taxpayer's action to enjoin the city from collecting school taxes for 1959, holding that a 1959 statute which disabled a city from collecting such taxes after a judicial decision that it could not maintain racially separate schools applied only to taxes leviable under that act, and that the taxes in question were being levied under prior law (p. 411).

A three-judge federal district court enjoined the enforcement of two *Louisiana* criminal statutes prohibiting the influencing of parents to send their children to schools operated "in violation of any law of this state" (p. 413). Another three-judge federal district court in *Louisiana* invited the United States and state attorneys general to submit briefs on the question of whether the states are required under the due process clause to provide public education (p. 416).

An express Protestant-Gentile restriction was deleted by the *New Jersey* Supreme Court from a testamentary gift to Amherst College, because the college charter forbade the acceptance of a gift with a religious restriction (p. 443).

The *Tennessee* Pupil Assignment Law was approved by a federal district court as an adequate plan of desegregation for the Memphis public schools, and an injunction against operation of a compulsory bi-racial school system was denied on the grounds that the schools were not bi-racially operated, and that plaintiffs had failed to exhaust their administrative remedies (p. 428). The school board of Knoxville submitted a plan for desegregating its technical schools (p. 426).

A United States court of appeals affirmed the denial of Charlottesville, *Virginia*, Negro students' applications for enrollment in city white schools, because the district court had retained

jurisdiction to re-examine the situation; but the appellate court expressed concern about the present methods of administration of the city's pupil assignment plan (p. 439). A federal district court ruled that the United States Attorney General had no right to intervene as a party plaintiff in the Prince Edward County public school case until the court had first determined that its orders were being violated or circumvented, and also denied permissive intervention as requiring unnecessary delay (p. 432).

Civil Rights

A federal district court in *Alabama* ruled that each litigant in a civil rights case before it must be represented by one local counsel who is personally aware of the various social and legal problems involved (p. 455).

A complaint alleging that Chicago, *Illinois*, police officers inflicted beatings on plaintiff with the intent to punish him for refusing to incriminate himself was held by a United States court of appeals to state a cause of action (p. 454).

The Attorney General of *Louisiana* advised state officials that local committees of the United States Civil Rights Commission cannot compel the supplying of information which had been sought by them (p. 655).

Criminal Law

The *Virginia* Supreme Court of Appeals affirmed the trespass convictions of Richmond sit-in participants, holding that the state trespass statute was not a racial segregation law, that defendants were not arrested because of race, and that the procuring of arrest warrants was not state action within the Fourteenth Amendment (p. 471). A three-judge federal district court dismissed a complaint by Petersburg, Hopewell, and Lynchburg sit-in participants

seeking restraint of the enforcement of state trespass statutes, holding that the amendments to those statutes increasing their penalties and coverage did not invalidate them (p. 467).

Governmental Facilities

The United States Supreme Court reversed a *Delaware* Supreme Court decision that racial discrimination by a restaurant in a Wilmington publicly-owned parking building was not state action violative of the Fourteenth Amendment (p. 379).

Continued discrimination at the Mobile, *Alabama*, municipal golf course was enjoined by a federal district court, but plaintiffs' claims for damages for having to travel long distances to other cities to play golf were dismissed (p. 484).

A United States court of appeals affirmed an injunction against continued racial discrimination in the municipal swimming pools of Miami, *Florida* (p. 491).

A United States court of appeals reduced a court-granted delay in desegregating Charleston, *South Carolina*, golf courses from 8 months to 6 (p. 486).

Federal government employee recreation organizations were directed by the President of the United States not to use the name or the facilities of the federal government if they practice racial discrimination (p. 377).

Operators of public accommodations in federal parks were prohibited from discriminating against prospective patrons or employees on the basis of race (p. 652).

Transportation

Three Ku Klux Klan organizations and certain of their individual leaders were enjoined by a federal district court in *Alabama* from interfering with the flow of interstate commerce in connection with "freedom rides," and Montgomery city officials were enjoined from refusing to provide protection for the interstate travelers participating in the "Freedom Rides." The court also issued a temporary injunction against the sponsors of such rides, restraining them from encouraging further rides because

they also unduly interfere with the free flow of interstate commerce; but this order was allowed to die due to a technical error. In separate proceedings in a state court, unnamed officials of CORE were enjoined from traveling within the state, and from other conduct "calculated to provoke breaches of the peace" (p. 528). A federal district court held the segregation orders of the Alabama Public Service Commission unconstitutional, and the commission was enjoined from requiring racial designation of waiting rooms. In the same action, the Birmingham Transit Company was enjoined from posting and maintaining racial segregation signs in waiting rooms, and the Birmingham Board of Commissioners was enjoined from using racial criteria for determining rights to occupy waiting rooms (p. 566).

A Baton Rouge, *Louisiana*, bus segregation ordinance was declared unconstitutional by a federal district court (p. 522).

"Freedom ride" participants were convicted by a Jackson, *Mississippi*, municipal court of violating the state "breach of the peace" statute on findings that defendants intended to challenge the state's segregation laws by defiance calculated to incite violence (p. 544).

A Memphis, *Tennessee*, general sessions court denied a warrant for the arrest of a city transit company's officers for allowing its buses to operate in a non-segregated manner in contravention of state statutes, and held the statute requiring segregated seating unconstitutional and unenforceable (p. 523).

Trial Procedure

A federal district court in *Connecticut* refused to dismiss an indictment on the ground of improper selection of the jury list for the grand jury, holding that defendant had not sustained his burden of showing that persons of Italian extraction and of Jewish faith had been excluded (p. 616).

A United States court of appeals held that a convicted rapist had made out a prima facie case of racial discrimination in the selection of Pulaski County, *Arkansas*, jury panels, and remanded his case for retrial (p. 589). The Arkansas Supreme Court denied a petition for an immediate trial by accused rapists in Pulaski

County, since defendants admitted that they would immediately move to quash the jury panel as improperly selected (p. 622). In a separate action, the state supreme court affirmed a Negro's conviction for murder in a Pulaski County court over his objection that Negroes had been systematically included on the jury panel (p. 610). In a third case, the state supreme court held that the question, "Are you a segregationist or an integrationist?" was improper on voir dire in the trial of an alleged building-dynamiter (p. 599).

A Negro's conviction for rape was first affirmed, then reversed, by the *Louisiana* Supreme Court, which held that defendant's counsel should have been permitted to ask prospective jurors whether they were members of any religious, integrationist, or segregationist groups (p. 578).

A Negro's conviction for murder was affirmed by the *South Carolina* Supreme Court over his objection that he had not been allowed to ask prospective jurors whether his race would prejudice a recommendation for mercy if he were found guilty (p. 614).

The *Texas* Court of Criminal Appeals held that a jury panel was properly selected, even where the potential juror's race was shown on the jury wheel card, as long as the venire included Negroes and the race of the veniremen could not be ascertained before the card was drawn (p. 620).

Miscellaneous

The United States Supreme Court struck down, as violative of due process, a 1958 *Louisiana* statute enacted to forestall Communist infiltration in "non-trading" organizations, and sustained a temporary injunction against enforcement of an anti-Ku Klux Klan membership list disclosure statute against the NAACP because of the possibility of economic reprisals (p. 385).

A United States court of appeals held that the NLRB has the power to order a representation election in a plant located on Navajo Indian tribal lands, because Congress has adopted a national labor policy superseding the local policies of both states and Indian tribes (p. 494).

The religious freedom of members of the "Muslim Religious Group" was held by the *California* Supreme Court not to have been denied by prison officials, and regulations restricting their religious activities were held to be reasonable in view of the threat the Muslims posed to the maintenance of order within the prison (p. 456).

The *Illinois* Supreme Court ordered a trial held on whether the Deerfield Park District's condemnation of land on which a private company had planned to build a racially mixed subdivision was necessary and for a public purpose (p. 487).

Cotton gin companies entered a stipulation in a federal district court in *Louisiana* that they would gin the cotton of a Negro farmer who testified before the United States Civil Rights Commission and thereafter had been unable to procure ginning services (p. 474).

A racially restrictive covenant on the use of a cemetery lot was struck down by the *Minnesota* Supreme Court as contrary to a state statute (p. 504).

The *North Carolina* Supreme Court held that a Negro voter could not be tested for literacy by requiring her to write a passage from the Constitution when read to her by the registrar (p. 477).

A United States court of appeals held that the *Virginia* courts would have to rule on whether a state statute requiring segregation in places of public amusement applied to restaurants before the federal court could rule on whether a restaurateur's refusal of service to a Negro was "under color of law" (p. 512).

Fair Employment Acts were passed in *Idaho* (p. 630), *Kansas* (p. 625), and *Nevada* (p. 631).

Legislation providing non-discriminatory access to various categories of public places was passed in *Idaho* (p. 630), *Nevada* (p. 631), *North Dakota* (p. 644), and *Wyoming* (p. 649), and amendments broadening coverage of prior laws were passed in *Indiana* (p. 643) and *Oregon* (p. 644).

Fair Housing Acts were passed in *Minnesota* (p. 636) and *Nevada* (p. 631), and coverage expanded in *New York* (p. 645).

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PRESIDENT

GOVERNMENTAL FACILITIES Recreation Programs—Federal

On April 18, 1961, the President of the United States directed that action be taken to assure that no use is made of the name, sponsorship, facilities, or activities of any executive department or agency of the federal government in connection with any employee recreation organization which practices racial discrimination. (See 6 Race Rel. L. Rep. 9).

THE WHITE HOUSE

April 18, 1961

MEMORANDUM FOR THE HEADS OF ALL EXECUTIVE DEPARTMENTS AND AGENCIES

Executive Order Number 10925, promulgated March 6, 1961, reaffirms that "discrimination because of race, creed, color or national origin is contrary to the Constitutional principles and policies of the United States" and that "it is the policy of the Executive Branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government."

I want immediate and specific action taken to assure that no use is made of the name, sponsorship, facilities, or activity of any Executive Department or Agency by or for any employee recreational organization practicing discrimination based on race, creed, color, or national origin. Current practices in each Department are to be brought into immediate compliance with this policy, and a report by the head of each Executive Agency filed to that effect before May 1, 1961.

s/John F. Kennedy

THE PRESIDENT

GOVERNMENTAL MATTERS

Executive Department—Continued

On April 10, 1901, the President issued a proclamation in which he announced that he had received from the Senate a bill for the purpose of amending the act of March 3, 1879, relating to the organization of the Department of the Interior.

The bill was signed by the President on April 10, 1901.

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UNITED STATES SUPREME COURT

GOVERNMENTAL FACILITIES Restaurants—Delaware

William H. BURTON v. WILMINGTON PARKING AUTHORITY, et al.

United States Supreme Court, April 17, 1961, 81 S.Ct. 856.

SUMMARY: A Delaware Negro citizen was refused service because of race by a Wilmington restaurant located in a leased space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violates the Fourteenth Amendment, and for injunctive relief. The court held that, as the renting to the restaurant and other tenants constituted a "substantial and integral part of the means to finance a vital public facility," it was incumbent on the Authority to enter into leases that would require the tenant to carry out the Authority's constitutional duty not to deny state citizens equal protection of the laws. An order was therefore issued granting to plaintiff and his class the relief requested. 4 Race Rel. L. Rep. 353. On appeal, the state supreme court reversed. Finding that the Authority did not locate the restaurant within the building for the convenience and service of the public using the parking facility and has not directly or indirectly operated it nor financially enabled it to operate, the court held that the Authority's only concern in the restaurant—the receipt of rent which defrays part of the operating expense of providing the public with off-street parking—was insufficient to make the discriminatory act that of the state. For discussion of other issues passed upon, see 5 Race Rel. L. Rep. 194 (1960).

The United States Supreme Court granted a writ of certiorari and reversed the judgment, holding that the exclusion of the appellant under the circumstances violated the Fourteenth Amendment's Equal Protection Clause. Determining that the premises were publicly owned, that the building as an entity was dedicated to public uses, and that the commercially leased areas "constituted a physical and financially integral and, indeed, indispensable part of the state's plan to operate its project as a self-sustaining unit," the court found "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." The court termed the state's position as one of "interdependence" with the restaurant and emphasized that since the state was a "joint participant", the restaurant's challenged activity could not be so "purely private" as to fall outside the scope of the Fourteenth Amendment. Three Justices dissented. Mr. Justice CLARK delivered the opinion of the Court.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Au-

thority's lessee. Appellant claims that such refusal abridges his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Delaware has held that Eagle was acting in "a purely private capacity" [157 A.2d 902] under its lease; that its action was not that of the Authority and was not, therefore, state action within the contemplation of the prohibi-

tions contained in that Amendment. It also held that under 24 Del.Code § 1501,¹ Eagle was a restaurant, not an inn, and that as such it "is not required [under Delaware law] to serve any and all persons entering its place of business." Del.1960, 157 A.2d 894, 902. On appeal here from the judgment as having been based upon a statute construed unconstitutionally, we postponed consideration of the question of jurisdiction under 28 U.S.C. § 1257(2), 28 U.S.C.A. § 1257(2), to the hearing on the merits. 364 U.S. 810, 81 S.Ct. 52, 5 L.Ed. 2d 40. We agree with the respondents that the appeal should be dismissed and accordingly the motion to dismiss is granted. However, since the action of Eagle in excluding appellant raises an important constitutional question, the papers whereon the appeal was taken are treated as a petition for a writ of certiorari, 28 U.S.C. § 2103, 28 U.S.C.A. § 2103, and the writ is granted. 28 U.S.C. § 1257(3), 28 U.S.C.A. § 1257(3). On the merits we have concluded that the exclusion of appellant under the circumstances shown to be present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Authority was created by the City of Wilmington pursuant to Tit. 22, Del. Code, c. 5, §§ 501-515. It is "a public body corporate and politic, exercising public powers of the State as an agency thereof." § 504. Its statutory purpose is to provide adequate parking facilities for the convenience of the public and thereby relieve the "parking crisis, which threatens the welfare of the community * * *." § 501(7), (8) and (9). To this end the Authority is granted wide powers including that of constructing or acquiring by lease, purchase or condemnation, lands and facilities, and that of leasing "portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities." § 504(a). The Act provides that the rates and charges for its facilities must be reasonable and are to be determined exclusively

by the Authority "for the purposes of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance, and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations or with the city." § 504(b) (8). The Authority has no power to pledge the credit of the State of Delaware but may issue its own revenue bonds which are tax exempt. Any and all property owned or used by the Authority is likewise exempt from state taxation.

The first project undertaken by the Authority was the erection of a parking facility on Ninth Street in downtown Wilmington. The tract consisted of four parcels, all of which were acquired by negotiated purchases from private owners. Three were paid for in cash, borrowed from Equitable Security Trust Company, and the fourth, purchased from Diamond Ice and Coal Company, was paid for "partly in Revenue Bonds of the Authority and partly in cash [\$934,000] donated by the City of Wilmington, pursuant to 22 Del.C., c. 5. * * * Subsequently the City of Wilmington gave the Authority \$1,822,827.69 which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan."

Before it began actual construction of the facility, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and proceeds from sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital needed for its "debt-service" requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter long-term leases with responsible tenants for commercial use of some of the space available in the projected "garage building." The public was invited to bid for these leases.

In April 1957 such a private lease, for 20 years and renewable for another 10 years, was made with Eagle Coffee Shoppe, Inc., for use as a "restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose." The multi-level space of the building

1. The statute provides that: "No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business." The term customers shall be taken to include all who have occasion for entertainment or refreshment.

which was let to Eagle, although "within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper * * * [whose main entrance] is located on Ninth Street." In its lease the Authority covenanted to complete construction expeditiously, including completion of "the decorative finishing of the leased premises and utilities therefor, without cost to Lessee," including necessary utility connections, toilets, hung acoustical tile and plaster ceilings; Vinyl asbestos, ceramic tile and concrete floors; connecting stairs and wrought iron railings; and wood-floored show windows. Eagle spent some \$220,000 to make the space suitable for its operation and, to the extent such improvements were so attached to realty as to become part thereof, Eagle to the same extent enjoys the Authority's tax exemption.

The Authority further agreed to furnish heat for Eagle's premises, gas service for the boiler room, and to make, at its own expense, all necessary structural repairs, all repairs to exterior surfaces except store fronts and any repairs caused by lessee's own act or neglect. The Authority retained the right to place any directional signs on the exterior of the let space which would not interfere with or obscure Eagle's display signs. Agreeing to pay an annual rental of \$28,700, Eagle covenanted to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Its lease, however, contains no requirement that its restaurant services be made available to the general public on a non-discriminatory basis, in spite of the fact that the Authority has power to adopt rules and regulations respecting the use of its facilities except any as would impair the security of its bondholders. § 511.

Other portions of the structure were leased to other tenants, including a bookstore, a retail jeweler, and a food store. Upon completion of the building, the Authority located at appropriate places thereon official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags.

In August 1958 appellant parked his car in the building and walked around to enter the restaurant by its front door on Ninth Street. Having entered and sought service, he was refused it. Thereafter he filed this declaratory

judgment action in the Court of Chancery. On motions for summary judgment, based on the pleadings and affidavits, the Chancellor concluded, contrary to the contentions of respondents, that whether in fact the lease was a "device" or was executed in good faith, it would not "serve to insulate the public authority from the force and effect of the Fourteenth Amendment." 150 A.2d 197, 198. He found it not necessary, therefore, to pass upon the rights of private restaurateurs under state common and statutory law, including 24 Del.Code § 1501. The Supreme Court of Delaware reversed, as we mentioned above, holding that Eagle "in the conduct of its business, is acting in a purely private capacity." [157 A.2d 902]. It, therefore, denied appellant's claim under the Fourteenth Amendment. Upon reaching the application of state law, it held, contrary to appellant's assertion that Eagle maintained an inn, that Eagle's operation was "primarily a restaurant and thus subject to the provisions of 24 Del.C. § 1501, which does not compel the operator of a restaurant to give service to all persons seeking such." Delaware's highest court has thus denied both the equal protection claims of the appellant as well as his state-law contention concerning the applicability of § 1501.

On the jurisdictional question, we agree that the judgment of Delaware's court does not depend for its ultimate support upon a determination of the constitutional validity of a state statute, but rather upon the holding that on the facts Eagle's racially discriminatory action was exercised in "a purely private capacity" and that it was, therefore, beyond the prohibitive scope of the Fourteenth Amendment.

The Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, "embedded in our constitutional law" the principle "that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Chief Justice Vinson in *Shelley v. Kraemer*, 1948, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161. It was language in the opinion in the Civil Rights Cases, *supra*, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicating its consequence upon "State action of every kind * * * which denies * * * the equal protection of the laws." At p. 11 of 109 U.S., at page 21 of 3

S.Ct. And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon "state participation through any arrangement, management, funds or property." *Cooper v. Aaron*, 1958, 358 U.S. 1, 4, 78 S.Ct. 1401, 1403, 3 L.Ed.2d 5. It is clear, as it always has been since the Civil Rights Cases, *supra*, that "individual invasion of individual rights is not the subject-matter of the amendment," 109 U.S. at page 11, 3 S.Ct. at page 21, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is "an impossible task" which "this Court has never attempted." *Kotch v. Board of River Port Pilot Com'rs*, 330 U.S. 552, 556, 67 S.Ct. 910, 912, 91 L.Ed. 1093. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

The trial court's disposal of the issues on summary judgment has resulted in a rather incomplete record, but the opinion of the Supreme Court as well as that of the Chancellor present the facts in sufficient detail for us to determine the degree of state participation in Eagle's refusal to serve petitioner. In this connection the Delaware Supreme Court seems to have placed controlling emphasis on its conclusion, as to the accuracy of which there is doubt, that only some 15% of the total cost of the facility was "advanced" from public funds; that the cost of the entire facility was allocated three-fifths to the space for commercial leasing and two-fifths to parking space; that anticipated revenue from parking was only some 30.5% of the total income, the balance of which was expected to be earned by the leasing; that the Authority had no original intent to place a restaurant in the building, it being only a hap-penstance resulting from the bidding; that Eagle expended considerable moneys on furnishings; that the restaurant's main and marked public

entrance is on Ninth Street without any public entrance direct from the parking area; and that "the only connection Eagle has with the public facility * * * is the furnishing of the sum of \$28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise." 157 A.2d 894, 901. While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged.

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." 22 Del. Code, c. 5, §§ 501, 514. The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, cf. *Derrington v. Plummer*, 5 Cir., 240 F.2d 922, 925, the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but are indispen-

sable elements in the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings. As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction.² By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private"

as to fall without the scope of the Fourteenth Amendment.

Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very "largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law," *Whitney v. State Tax Comm.*, 309 U.S. 530, 542, 60 S.Ct. 635, 640, 84 L.Ed. 909. Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

The judgment of the Supreme Court of Delaware is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

CONCURRING OPINION

Mr. Justice STEWART, concurring.

I agree that the judgment must be reversed, but I reach that conclusion by a route much more direct than the one traveled by the Court. In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers * * *." There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a

2. See *Aaron v. Cooper*, 8 Cir., 261 F.2d 97; *City of Greensboro v. Simkins*, 4 Cir., 246 F.2d 425 affirming D.C.M.D. N.C., 149 F.Supp. 562; *Derrington v. Plummer*, 5 Cir., 240 F.2d 922; *Coke v. City of Atlanta*, D.C.N.D. Ga., 184 F. Supp. 579; *Jones v. Marva Theatres*, D.C.D.Md., 180 F.Supp. 49; *Tate v. Department of Conservation*, D.C.E.D. Va., 133 F.Supp. 53, affirmed 4 Cir., 231 F.2d 615; *Nash v. Air Terminal Services*, D.C.E.D.Va., 85 F.Supp. 545; *Lawrence v. Hancock*, D.C.S.D.W.Va., 76 F.Supp. 1004, and see *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112, vacating and remanding 6 Cir., 202 F.2d 275.

* 24 Del.Code § 1501. The complete text of the statute is set out in the Court opinion at note 1.

law seems to me clearly violative of the Fourteenth Amendment. I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid.

Dissent

Mr. Justice HARLAN, whom Mr. Justice WHITTAKER joins, dissenting.

The Court's opinion, by a process of first indiscriminately throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of "state action."

I find it unnecessary, however, to inquire into the matter at this stage, for it seems to me apparent that before passing on the far-reaching constitutional questions that may, or may not, be lurking in this judgment, the case should first be sent back to the state court for clarification as to the precise basis of its decision. In deciding this case the Delaware Supreme Court, among other things, said:

"It [Eagle] acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 Del.C., § 1501 with respect to restaurant keepers. 10 Am.Jur., Civil Rights, §§ 21, 22; 52 Am.Jur., Theatres, § 9; Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F.2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment." [157 A.2d 902].

If in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute "as authorizing discriminatory classification based

exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment. It would then be quite unnecessary to reach the much broader questions dealt with in the Court's opinion. If, on the other hand, the state court meant no more than that under the statute, as at common law, Eagle was free to serve only those whom it pleased, then, and only then, would the question of "state action" be presented in full-blown form.

I think that sound principles of constitutional adjudication dictate that we should first ascertain the exact basis of this state judgment, and for that purpose I would either remand the case to the Delaware Supreme Court, see *Musser v. State of Utah*, 333 U.S. 95, 68 S.Ct. 397, 92 L.Ed. 562; cf. *Harrison v. N. A. A. C. P.*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152, or hold the case pending application to the state court for clarification. See *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L.Ed. 789. It seems to me both unnecessary and unwise to reach issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent.

Dissent

Mr. Justice FRANKFURTER, dissenting.

According to my brother STEWART, the Supreme Court of Delaware has held that one of its statutes, 24 Del.Code § 1501, sanctions a restaurateur denying service to a person solely because of his color. If my brother is correct in so reading the decision of the Delaware Supreme Court his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment. My Brother HARLAN also would find the claim of invalidity of the statute decisive if he could read the state court's construction of it as our brother STEWART reads it. But for him the state court's view of its statute is so ambiguous that he deems it necessary to secure a clarification from the state court of how in fact it did construe the statute.

I certainly do not find the clarity that my brother STEWART finds in the views expressed by the Supreme Court of Delaware regarding 24 Del.Code § 1501. If I were forced to construe that court's construction, I should find the balance of considerations leading to the opposite

* 24 Del.C. § 1501, reads as follows:

"No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business."

conclusion from his, namely, that it was merely declaratory of the common law and did not give state sanction to refusing service to a person merely because he is colored. The Court takes no position regarding the statutory meaning which divides my brothers HARLAN and STEWART. Clearly it does not take Mr. Justice STEWART'S view of what the Supreme Court of Delaware decided. If it did, it would undoubtedly take his easy route to decision and not reach the same result by its much more circuitous route.

Since the pronouncement of the Supreme Court of Delaware thus lends itself to three views, none of which is patently irrational, why is not my brother HARLAN'S suggestion for solving this conflict the most appropriate solution? Were we to be duly advised by the Supreme Court of Delaware that Mr. Justice STEWART is correct in his reading of what it

said, there would be an easy end to our problem. There would be no need for resolving the problems in state-federal relations with which the Court's opinion deals. If, on the other hand, the Delaware court did not mean to give such an invalidating construction to its statute, we would be confronted with the problems which the Court now entertains for decision, unembarrassed by disregard of a simpler issue. This would involve some delay in adjudication. But the time would be well spent, because the Court would not be deciding serious questions of constitutional law any earlier than due regard for the appropriate process of constitutional adjudication requires.

Accordingly, I join in Mr. Justice HARLAN'S proposed disposition of the case without intimating any view regarding the question, prematurely considered by the Court, as to what constitutes state action.

ORGANIZATIONS NAACP—Louisiana

LOUISIANA *ex rel.* Jack P. F. GREMILLION, Attorney General, et al. v. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.

United States Supreme Court, May 22, 1961, 81 S.Ct. 1333.

SUMMARY: Actions by the state of Louisiana against the NAACP, and by the NAACP's New Orleans branch against the Louisiana Secretary of State to determine the constitutionality of two state statutes were consolidated in a three-judge federal district court. One statute, enacted in 1924 to curb acts of lawlessness and violence by the Ku Klux Klan, required each of several kinds of organizations to file annually a list of names and addresses of members residing in the state. The other statute, enacted in 1958, required non-trading organizations engaged in social, educational, or political activities, which were affiliated with organizations created or operating under laws of other states, to file an affidavit attesting that none of the officers of the out-of-state affiliate was a member of any organization cited by the Congressional House un-American Activities Committee or the United States Attorney General as Communist, Communist-front, or subversive. The district court found both statutes unconstitutional. 5 Race Rel. L. Rep. 467 (1960). The United States Supreme Court affirmed on appeal, striking the 1958 statute down as not consonant with due process, because it would be impossible for the Louisiana organization to know whether officers of the out-of-state organizations were members of subversive organizations. The court also sustained, on freedom of association grounds, a temporary injunction against enforcement of the 1924 statute against the NAACP because pre-

liminary hearings had disclosed that the filing of membership lists by affiliates of the NAACP had resulted in economic reprisals against their members.

Mr. Justice DOUGLAS delivered the opinion of the Court.

One of the suits that is consolidated in this appeal was instituted in 1956 by the then Attorney General of Louisiana against appellee, the National Association for the Advancement of Colored People, in a Louisiana court and sought to enjoin it from doing business in the State. It was removed to the federal court.¹ Thereafter NAACP sued appellants in the federal court asking for a declaratory judgment that two laws of Louisiana were unconstitutional. A three-judge court was convened (28 U.S.C. § 2281, 28 U.S.C.A. § 2281) and the cases consolidated. After a hearing (on affidavits) and oral argument the court entered a *temporary* injunction that denied relief to appellants and enjoined them from enforcing the two laws in question. D.C., 181 F.Supp. 37. The case is here on appeal. 28 U.S.C. § 1253, 28 U.S.C.A. § 1253. We noted probable jurisdiction. 364 U.S. 869, 81 S.Ct. 112, 5 L.Ed.2d 90.

One of the two statutes of Louisiana in question prohibits any "non-trading" association from doing business in Louisiana if it is affiliated with any "foreign or out of state non-trading" association "any of the officers or members of the board of directors of which are members of Communist, Communist-front, or subversive organizations, as cited by the House of Congress [sic] Un-American Activities Committee or the United States Attorney."² Every non-trading association affiliated with an out-of-state association must file annually with Louisiana's Secretary of State an affidavit that "none of the officers" of the affiliate is "a member" of any such organization.³ Penalties against the officers and members are provided for failure to file the affidavit and for false filings.

The NAACP is a New York corporation with some forty-eight directors, twenty vice-presidents, and ten chief executive officers. Only a few reside or work in Louisiana. The District Court commented that the statute "would require the impossible" of the Louisiana residents or workers. 181 F.Supp. at page 40. We have received no serious reply to that criticism. Such a requirement in a law compounds the vices

present in statutes struck down on account of vagueness. Cf. *Winters v. People of State of New York*, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840. It is not consonant with due process to require a person to swear to a fact that he cannot be expected to know (cf. *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519), or alternatively to refrain from a wholly lawful activity.

The other statute⁴ requires the principal officer of "each fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization or organizations created for similar purposes" and operating in Louisiana to file with the Secretary of State annually "a full, complete and true list of the names and addresses of all of the members and officers" in the State. Members of organizations whose lists have not been filed are prohibited from holding or attending any meeting of the organization. Criminal penalties are attached both to officers and to members.

We are told that this law was passed in 1924 to curb the Ku Klux Klan, but that it was never enforced against any other organization until this litigation started; that when the State brought its suit some affiliates of NAACP in Louisiana filed membership lists, and that after those filings, members were subjected to economic reprisals. 181 F.Supp. at page 39. The State denies that this law is presently being enforced only against NAACP; it also challenges the assertions that disclosure of membership in the NAACP results in reprisals. While hearings were held before the temporary injunction issued, the case is in a preliminary stage and we do not know what facts further hearings before the injunction becomes final may disclose. It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members. *N. A. A. C. P. v. State of Alabama*, 357 U.S. 449, 459, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488. We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Id.*, 357 U.S. at page 460, 78 S.Ct. at page 1171; *Bates v. City of*

1. See also *State v. N. A. A. C. P.*, La.App., 90 So.2d 884.

2. La.Rev.Stat., 1950, § 14:385 (1958 Supp.).

3. La.Rev.Stat., 1950, § 14:386 (1958 Supp.).

4. La.Rev.Stat., 1950, §§ 12:401 to 12:409.

Little Rock, 361 U.S. 516, 523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480. And where it is shown, as it was in *N. A. A. C. P. v. State of Alabama*, supra, 357 U.S. 462-463, 78 S.Ct. 1171-1172, that disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required. And see *Bates v. City of Little Rock*, supra, 361 U.S. 523-524, 80 S.Ct. 416-417.

We are in an area where, as *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: "• • • even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*, 364 U.S. 488, 81 S.Ct. 252.

The most frequent expressions of that view have been made in cases dealing with local ordinances regulating the distribution of literature. Broad comprehensive regulations of those First Amendment rights have been repeatedly struck down (*Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213), though the power to regulate the time, manner, and place of distribution was never doubted. As stated in *Schneider v. State*, supra, 308 U.S. 160-161, 60 S.Ct. 150, the municipal authorities have the right to "regulate the conduct of those using the streets," to provide traffic regulations, to prevent "throwing literature broadcast in the streets," and the like. Yet, while public safety, peace, comfort, or convenience can be safeguarded by regulating the time and manner of solicitation (*Cantwell v. State of Connecticut*, supra, 310 U.S. 306-307, 60 S.Ct. 904-905), those regulations need to be "narrowly drawn to prevent the supposed evil." *Id.*, 310 U.S. 307, 60 S.Ct. 905. And see *Talley v. State of California*, 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559.

Our latest application of this principle was in *Shelton v. Tucker*, supra, where we held that, while a State has the undoubted right to inquire into the fitness and competency of its teachers, a detailed disclosure of every conceivable kind of associational tie a teacher has had probed into relationships that "could have no possible bearing upon the teacher's occupational competence or fitness." *Id.*, 364 U.S. 488, 81 S.Ct. 252.

At one extreme is criminal conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights. These lines mark the area in which the present controversy lies, as the District Court rightly observed.

Affirmed.

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Mr. Justice HARLAN and Mr. Justice STEWART concur in the result.

Mr. Justice FRANKFURTER, whom Mr. Justice CLARK joins, concurring.

One of the important considerations that led to the enactment of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C.A. § 101 et seq., limiting the jurisdiction of the District Courts to grant injunctions in labor controversies, was that such injunctions were granted, usually by way of temporary relief, on the basis of affidavits. I am of the view that the issues that arise in controversies like the present one are likewise more securely adjudicated upon a foundation of oral testimony rather than affidavits. At all events, I am dubious about a fixed rule, such as that which is apparently in effect in the District Court of the Eastern District of Louisiana, barring oral testimony—subject to the usual safeguards of cross examination—in proceedings for a temporary injunction. I assume that oral testimony will be available in a proceeding to make the temporary injunction permanent.

In this understanding I concur in the judgment of the Court.

RELIGIOUS FREEDOM**Sunday Laws—Massachusetts, Maryland, Pennsylvania**

Margaret McGOWAN, et al. v. STATE of Maryland.

GALLAGHER, Chief of Police of Springfield, Massachusetts, et al. v. CROWN KOSHER SUPER MARKET of Massachusetts, Inc., et al.

TWO GUYS FROM HARRISON-ALLEN TOWN, Inc., v. Paul A. McGINLEY, District Attorney, County of LeHigh, Pennsylvania, et al.

Abraham BRAUNFELD, et al., v. Albert BROWN, Commissioner of Police of the City of Philadelphia, et al.

United States Supreme Court, May 29, 1961, 81 S.Ct. 1101, 1122, 1134, 1144, 1153.

SUMMARY: Statutes of Massachusetts, Maryland, and Pennsylvania which require Sunday closing of certain business establishments were challenged in various actions as violating the First and Fourteenth Amendments of the United States Constitution. After conflicting determinations in lower courts (151 A.2d 165, 176 F.Supp. 466 [4 Race Rel. L. Rep. 1016], 179 F.Supp. 744, 273 F.2d 954, 184 F.Supp. 352), the United States Supreme Court rejected the challenges, holding that: (1) the purpose of the laws was to set aside a day for rest rather than to aid any religion; (2) the origin of the laws in religion did not affect their present validity; (3) persons who were injured only economically could not claim violation of their religious rights under the First Amendment; (4) if those who observe religious holidays other than Sunday were permitted to do business on Sunday, persons who did observe Sunday might claim religious persecution against them; (5) it would be impermissible to strike down indiscriminately legislation which only indirectly placed a burden on the exercise of religion; and (6) classification of certain products for sale on Sunday was a reasonable legislative act. Reproduced below are portions of the opinions and dissents in the cases which deal with problems of religious belief.

GALLAGHER, Chief of Police of the City of Springfield, Massachusetts, et al., Appellants, v. CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., et al., May 29, 1961, 81 S. Ct. 1122

Mr. Chief Justice WARREN announced the judgment of the Court and an opinion in which Mr. Justice BLACK, Mr. Justice CLARK, and Mr. Justice WHITTAKER concur.

The principal issues presented in this case are whether the Massachusetts Sunday Closing Laws¹ violate equal protection, are statutes respecting the establishment of religion or prohibit the free exercise thereof.

Appellees are Crown Kosher Super Market, a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith, which operates in Springfield, Massachusetts, and sells kosher meat and other food products that are almost exclusively kosher and which

has many orthodox Jewish customers; three of Crown's customers of the Orthodox Jewish faith, whose religion forbids them to shop on the Sabbath and requires them to eat kosher food, as representatives of that class of patrons; and the chief orthodox rabbi of Springfield, as representative of a class of orthodox rabbis whose duties include the inspecting of kosher food markets to insure compliance with Orthodox Jewish dietary laws.

Crown had previously been open for business on Sunday, on which day it had conducted about one-third of its weekly business. No other supermarket in the Springfield area had kept open on Sunday. Since the Orthodox Jewish religion requires its members to refrain from any commercial activity on the Sabbath—from sundown on Friday until sundown on Saturday, Crown was not opening during those hours. Although there is a statutory provision which permits Sabbatarians to keep their shops open until 10 a. m. on Sunday for the sale of kosher meat, Crown did not do so because it was economically imprac-

1. The statutory sections immediately before the Court are Mass.Gen.Laws Ann. c. 136, §§ 5 and 6. The Massachusetts Sunday Closing Laws in their entirety may be found in Mass.Gen.Laws Ann. c. 136; c. 131, § 58; c. 138, §§ 12 and 33; c. 149, §§ 47 and 48; c. 266, §§ 113 and 117. Those sections considered particularly relevant are set forth in an Appendix to this opinion.

tial; for the same reasons, Crown did not open after sundown on Saturday.

Those provisions of the law immediately under attack are in a section entitled "Observance of the Lord's Day." They forbid, under penalty of a fine of up to fifty dollars, the keeping open of shops and the doing of any labor, business or work on Sunday. Works of necessity and charity are excepted as is the operation of certain public utilities. There are also exemptions for the retail sale of drugs, the retail sale of tobacco by certain vendors, the retail sale and making of bread at given hours by certain dealers, and the retail sale of frozen desserts, confectioneries and fruits by various listed sellers.

(Appellees make several contentions that the statutes violate the constitutional guarantees of religious freedom.)

Secondly, appellees contend that the application to them of the Sunday Closing Laws prohibits the free exercise of their religion. Crown alleges that if it is required by law to abstain from business on Sunday, then, because its owners' religion demands closing from sundown Friday to sundown Saturday, Crown will be open only four and one-half days a week, thereby suffering extreme economic disadvantage. Crown's Orthodox Jewish customers allege that because their religious beliefs forbid their shopping on the Jewish Sabbath, the statute's effect is to deprive them, from Friday afternoon until

Monday of each week, of the opportunity to purchase the kosher food sanctioned by their faith. The orthodox rabbis allege that the statutes' effect greatly complicates their task of supervising the condition of kosher meat because the meat delivered on Friday would have to be kept until Monday. Furthermore, appellees contend that, because of all this, the statute discriminates against their religion.

These allegations are similar, although not as grave, as those made by appellants in *Braunfeld v. Brown*, 365 U.S. —, 81 S.Ct. 1144. Since the decision in that case rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions.⁷

Mr. Justice FRANKFURTER and Mr. Justice HARLAN concur in a separate opinion.

Accordingly, the decision below is reversed.

Reversed.

Mr. Justice BRENNAN and Mr. Justice STEWART dissent. They are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion. See their dissenting opinions in *Braunfeld v. Brown*, 81 S.Ct. at page 1149.

7. Appellants have advanced several procedural arguments. Since these were briefed only as ancillary issues and were not orally argued, and since their determination is not necessary to the disposition of the major questions presented, we deem it inappropriate to pass upon them now.

Abraham BRAUNFELD et al., Appellants v. Albert N. BROWN, Commissioner of Police of the City of Philadelphia, Pennsylvania, et al. May 29, 1961, 81 S.Ct. 1144.

Mr. Chief Justice WARREN announced the judgment of the Court and an opinion in which Mr. Justice BLACK, Mr. Justice CLARK, and Mr. Justice WHITTAKER concur.

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute,¹ enacted in 1959, which

1. 18 Purdon's Pa.Stat. Ann. § 4699.10 provides:

"Selling certain personal property on Sunday

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall,

proscribes the Sunday retail sale of certain enumerated commodities. Among the questions presented are whether the statute is a law respecting an establishment of religion and whether the statute violates equal protection. Since both of these questions, in reference to this

upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars (\$100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars (\$200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter."

very statute, have already been answered in the negative, *Two Guys from Harrison-Allentown, Inc., v. McGinley*, 365 U.S. —, 81 S.Ct. 1135, and since appellants present nothing new regarding them, they need not be considered here. Thus the only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above.

A three-judge court was properly convened and it dismissed the complaint on the authority of the *Two Guys from Harrison* case, 184 F.Supp. 352. On appeal brought under 28 U.S.C. § 1253, 28 U.S.C.A. § 1253, we noted probable jurisdiction, 362 U.S. 987, 80 S.Ct. 1078, 4 L.Ed.2d 1020.

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants' religion is impeded, that religion is

being subjected to discriminatory treatment by the State.

In *McGowan v. Maryland*, 365 U.S. —, —, 81 S.Ct. 1153, 1111, we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection. We observed that when Virginia passed its Declaration of Rights in 1776, providing that "all men are equally entitled to the free exercise of religion," Virginia repealed its laws which in any way penalized "maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever." But, Virginia retained its laws prohibiting Sunday labor.

We also took cognizance, in *McGowan*, of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquillity, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week. We reviewed the still growing state preoccupation with improving the health, safety, morals and general well-being of our citizens.

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213; *Reynolds v. United States*, 98 U.S. 145, 166, 25 L.Ed. 244. Thus, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But, this is not the case at bar; the statute before

us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell v. State of Connecticut*, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in *Reynolds v. United States*, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*" (Emphasis added.) 8 Works of Thomas Jefferson 113.²

And, in the *Barnette* case, the Court was careful to point out that "the freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the

rights of one end and those of another begin. . . . It is . . . to be noted that the compulsory flag salute and pledge requires *affirmation of a belief and an attitude of mind.*" 319 U.S. at pages 630, 633, 63 S.Ct. at page 1181. (Emphasis added.)

Thus, in *Reynolds v. United States*, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the duty to practice polygamy. And, in *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious duty to perform this work.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, id., 321 U.S. at page 165, 64 S.Ct. at page 441, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday.³ And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the

2. Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice, wrote:

"But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment." (Emphasis added.) Written in the *Connecticut Courant*, Dec. 17, 1787, as quoted in 1 Stokes, *Church and State in the United States*, 535.

3. See the concurring opinion of Mr. Justice Cardozo, joined by Mr. Justice Brandeis and Mr. Justice Stone, in *Hamilton v. Regents of University*, 293 U.S. 245, 265-268, 55 S.Ct. 197, 205-206, 79 L.Ed. 343.

legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i. e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 et seq. Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See *Cantwell v. State of Con-*

necticut, supra, 310 U.S. at pages 304-305, 60 S.Ct. at pages 903-904.⁴

As we pointed out in *McGowan v. Maryland*, supra, at page 1110 of 81 S.Ct., we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day in which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.

Also, in *McGowan*, we examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom. 365 U.S. at page —, 81 S.Ct. at page 1118. We found there that a State might well find that those alternatives would not accomplish bringing about a general day of rest. We need not examine them again here.

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State's interest in having all people rest one day would be satisfied.

A number of States provide such an exemption,⁵ and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as

4. Thus in cases like *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 and *Follett v. Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938, this Court struck down municipal ordinances which, in application, required religious colporteurs to pay a license tax as a condition to the pursuit of their activities because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on non-religious sources.

5. E. g., *Ind. Ann. Stat.* § 10-4301.

best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day;⁶ this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs,⁷ a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs,⁸ a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring.⁹ For all of these reasons, we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.

Mr. Justice HARLAN concurs in the judgment. Mr. Justice BRENNAN and Mr. Justice STEWART concur in our disposition of appellants' claims under the Establishment Clause

and the Equal Protection Clause. Mr. Justice FRANKFURTER and Mr. Justice HARLAN have rejected appellants' claim under the Free Exercise Clause in a separate opinion.

Accordingly, the decision is affirmed.

Affirmed.

Opinion by Brennan

Mr. Justice BRENNAN, concurring and dissenting.

I agree with THE CHIEF JUSTICE that there is no merit in appellants' establishment and equal-protection claims. I dissent, however, as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion.

The Court has demonstrated the public need for a weekly surcease from worldly labor, and set forth the considerations of convenience which have led the State of Pennsylvania to fix Sunday as the time for that respite. I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

The appellants are small retail merchants, faithful practitioners of the Orthodox Jewish faith. They allege—and the allegation must be taken as true, since the case comes to us on a motion to dismiss the complaint—that " . . . one who does not observe the Sabbath [by refraining from labor] . . . cannot be an Orthodox Jew." In appellants' business area Friday night and Saturday are busy times; yet appellants, true to their faith, close during the Jewish Sabbath, and make up some, but not all, of the business thus lost by opening on Sunday. "Each of the plaintiffs," the complaint continues, "does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays." Consequences even more drastic are alleged: "Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment." In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is

6. "If he [the Orthodox Jewish storekeeper] opens on Saturday, he is subjected to very fierce competition indeed from Christian shopkeepers, whereas on Sunday, supposing he closes on Saturday, he has an absolutely free run and no competition from Christian shopkeepers at all." 311 Parliamentary Debates, Commons, 492.

"It is true that the orthodox Jew will only be allowed to trade until two o'clock on Sunday, but during that time he will have a monopoly. That is a tremendous advantage. In many districts he will be the only trader with a shop open in that district." 101 Parliamentary Debates, Lords, 430.

7. Connecticut, which has such an exemption statute, requires that Sabbatarians, in order to qualify, file a written notice of religious belief with the prosecuting attorney. Conn.Gen.Stat.Rev. § 53-303.

8. E. g., Va.Code Ann., § 18.1-359.

9. E. g., 43 Purdon's Pa.Stat.Ann., §§ 951-963.

whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.

The first question to be resolved, however, is somewhat broader than the facts of this case. That question concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment, whether that limitation applies of its own force, or as absorbed through the less definite words of the Fourteenth Amendment. The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable. This canon of adjudication was clearly stated by Mr. Justice Jackson, speaking for the Court in *West Virginia State Board of Education v. Barnette*, 1943, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628:

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the state it is the more specific limiting principles of the First Amendment that finally govern this case."

This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society. See, e. g., *Murdock v. Commonwealth of Pennsylvania*, 1943, 319 U.S. 105, 115, 63 S.Ct. 870, 876, 87 L.Ed. 1292; *Jones v. City of Opelika*, 1943, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290; *Martin v. City of Struthers*, 1943, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; *Follett v. Town of McCormick*, 1944, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938; *Marsh v. State of Alabama*, 1946, 326 U.S. 501, 510, 66 S.Ct. 276, 280, 90 L.Ed. 265. Even the most concentrated and fully articulated attack on this high standard has seemingly admitted its validity in principle, while deploring some incidental phraseology. See *Kovacs v. Cooper*, 1949, 336 U.S. 77, 89, 95-96, 69 S.Ct. 448, 454, 458, 93 L.Ed. 513 (concurring opinion); but cf. *Ullmann v. United States*, 1956, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511. The honored place of religious freedom in our constitutional hierarchy, suggested long ago by the argument of counsel in *Permol v. Municipality No. 1 of City of New Orleans*, 1845, 3 How. 589, 600, 11 L.Ed. 739, and foreshadowed by a prescient footnote in *United States v. Carolene Products Co.*, 1938, 304 U.S. 144, 152, 58 S.Ct. 778, 783, 82 L.Ed. 1234, note 4, must now be taken to be settled. Or at least so it appeared until today. For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

Admittedly, these laws do not compel overt affirmation of a repugnant belief, as in *Barnette*, nor do they prohibit outright any of appellants' religious practices, as did the federal law upheld in *Reynolds v. United States*, 1878, 98 U.S. 145, 25 L.Ed. 244, cited by the Court. That is, the laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time

be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. And yet, such a tax, when applied in the form of an excise or license fee, was held invalid in *Follett v. Town of McCormick*, supra. All this the Court, as I read its opinion, concedes.

What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, as in *Prince v. Commonwealth of Massachusetts*, 1944, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, for appellants are reasoning and fully autonomous adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind.¹ We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's. Even England, not under the compulsion of a written constitution, but simply influenced by

considerations of fairness, has such an exemption for some activities.² The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that "its unsoundness is too apparent to require" discussion. *Selective Draft Law Cases* [*Arver v. United States*] 1918, 245 U.S. 366, 390, 38 S.Ct. 159, 165, 62 L.Ed. 349. However widespread the complaint, it is legally baseless, and the State's reliance upon it cannot withstand a First Amendment claim. We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this Court indicated otherwise in *United States v. Ballard*, 1944, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148. Such an inquiry is no more an infringement of religious freedom than the requirement imposed by the Court itself in *McGowan v. State of Maryland*, at page 1107 of 81 S.Ct., that a plaintiff show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause of the First Amendment. Finally, I find the Court's mention of a problem under state antidiscrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a *bona fide* occupational qualification.³ It happens, moreover, that Pennsylvania's statute has such a provision.⁴

In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: " * * * the rights of conscience are, in their nature, of peculiar delicacy, and

1. Conn.Gen.Stat., 1958 rev., § 53-303; Fla. Laws 1959, c. 59-1650, § 2; Ill.Rev.Stat., 1959, c. 38, § 549; Burns' Ind. Ann.Stat., 1956 repl., § 10-4301; Kan.Gen.Stat. Ann., 1949, § 21-953; Ky.Rev. Stat., 1959, § 436.160(2); Me.Rev.Stat., 1954, c. 134, § 44; Mass.Gen.Laws Ann., 1958, c. 136, § 6; Mich.Stat. Ann., 1957 rev., §§ 18.855, 18.122, 9.2702, Comp.Laws Supp. 1956, § 435.252; Comp.Laws 1948, §§ 338.682, 435.7; Mo.Rev.Stat., 1953, § 563.700; Neb.Rev.Stat., 1943, § 28-940; N.J.Stat. Ann., 1953, § 2A:171-4; McKinney's N.Y.:

Laws. Penal Law, § 2144; N.D.Rev.Code, 1943, § 12-2117; NDCC 12-21-17; Page's Ohio Gen.Code Ann., 1954, § 13045; Okla.Stat. Ann., 1958, Tit. 21, § 909; R.I.Gen.Laws, 1956, § 11-40-4; S.D.Code, 1939, § 13.1710; Vernon's Ann.Tex.Pen.Code, § 284; Va.Code, 1950, § 18.1-359; Wash.Rev.Code, 1959, § 9.76-.020; W.Va.Code Ann., 1955, c. 61, Art. 8, § 6073. Cf. Wis.Stat. Ann., 1958, § 301-33.

2. E. g., Shops Act, 1950, 14 Geo. VI, c. 28, § 53.

3. E. g., Mass.Gen.Laws Ann., 1958, c. 151B, § 4, subd. 1.

4. 43 Purdon's Pa.Stat. Ann. § 955.

will little bear the gentlest touch of governmental hand⁵

I would reverse this judgment and remand for a trial of appellants' allegations, limited to the free-exercise-of-religion issue.

Stewart Dissent

Mr. Justice STEWART, dissenting.

I agree with substantially all that Mr. Justice

5. 1 Annals of Cong. 730 (remarks of Representative Daniel Carroll of Maryland, August 15, 1789).

Frankfurter Opinion For All Sunday Closing Cases

Separate opinion of Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN joins.

V.

Appellees in the Gallagher case and appellants in the Braunfeld case contend that, as applied to them, Orthodox Jewish retailers and their Orthodox Jewish customers, the Massachusetts Lord's day statute and the Pennsylvania Sunday retail sales act violate the Due Process Clause of the Fourteenth Amendment because, in effect, the statutes deter the exercise and observance of their religion. The argument runs that by compelling the Sunday closing of retail stores and thus making unavailable for business and shopping uses one-seventh part of the week, these statutes force them either to give up the Sabbath observance—an essential part of their faith—or to forego advantages enjoyed by the non-Sabbatarian majority of the community. They point out, moreover, that because of the prevailing five-day working week of a large proportion of the population, Sunday is a day peculiarly profitable to retail sellers and peculiarly convenient to retail shoppers. The records in these cases support them in this.

The claim which these litigants urge assumes a number of aspects. First, they argue that any one-common-day-of-closing regulation which selected a day other than their Sabbath would be *ipso facto* unconstitutional in its application to them because of its effect in preferring persons who observe no Sabbath, therefore creating economic pressures which urge Sabbatarians to give up their usage. The creation of this pressure by the Sunday statutes, it is said, is not so necessary a means to the achievement of the

BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

ends of day-of-rest legislation as to justify its employment when weighed against the injury to Sabbatarian religion which it entails. Six-day week regulation, with the closing day left to individual choice, is urged as a more reasonable alternative.

Second, they argue that even if legitimate state interests justify the enforcement against persons generally of a single common day of rest, the choice of Sunday as that day violates the rights of religious freedom of the Sabbatarian minority. By choosing a day upon which Sunday-observing Christians worship and abstain from labor, the statutes are said to discriminate between religions. The Sunday observer may practice his faith and yet work six days a week, while the observer of the Jewish Sabbath, his competitor, may work only during five days, to the latter's obvious disadvantage. Orthodox Jewish shoppers whose jobs occupy a five-day week have no week-end shopping day, while Sunday-observing Christians do. Leisure to attend Sunday services, and relative quiet throughout their duration, is assured by law, but no equivalent treatment is accorded to Friday evening and Saturday services. Sabbatarians feel that the power of the State is employed to coerce their observance of Sunday as a holy day; that the State accords a recognition to Sunday Christian doctrine which is withheld from Sabbatarian creeds. All of these prejudices could be avoided, it is argued, without impairing the effectiveness of common-day-of-rest regulation, either by fixing as the rest time some day which is held sacred by no sect, or by providing for a Sunday work ban from which Sabbatarians are excepted, on condition of their abstaining from labor on Saturday. Fail-

ure to adopt these alternatives in lieu of Sunday statutes applicable to Sabbatarians is said to constitute an unconstitutional choice of means.

Finally, it is urged that if, as means, these statutes are necessary to the goals which they seek to attain, nevertheless the goals themselves are not of sufficient value to society to justify the disadvantage which their attainment imposes upon the religious exercise of Sabbatarians.

The first of these contentions has already been discussed. The history of Sunday legislation convincingly demonstrates that Sunday statutes may serve other purposes than the provision merely of one day of physical stoppage in seven. These purposes fully justify common-day-of-rest statutes which choose Sunday as the day.

In urging that an exception in favor of those who observe some other day as sacred would not defeat the ends of Sunday legislation, and therefore that failure to provide such an exception is an unnecessary—hence an unconstitutional—burden on Sabbatarians, the Gallagher appellees and Braunfeld appellants point to such exceptions in twenty-one of the thirty-four jurisdictions which have statutes banning labor or employment or the selling of goods on Sunday.¹⁰² Actually, in less than half of these twenty-one States does the exemption extend to sales activity as well as to labor.¹⁰³ There are tenable reasons why a legislature might choose not to make such

an exception. To whatever extent persons who come within the exception are present in a community, their activity would disturb the atmosphere of general repose and reintroduce into Sunday the business tempos of the week. Administration would be more difficult, with violations less evident and, in effect, two or more days to police instead of one. If it is assumed that the retail demand for consumer items is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position, presumably, to complain of discrimination against his religion.¹⁰⁴ Employers who wished to avail themselves of the exception would have to employ only their co-religionists,¹⁰⁵ and there might be introduced

102. Wisconsin, which does not have a general ban on Sunday labor, but does have a statute prohibiting automobile trading on that day, also makes an exception in favor of those who conscientiously observe the Jewish Sabbath. West's Wis. Stat. Ann., 1961 Supp., § 218.01(3) (a), par. 21. Other jurisdictions having statutes which cover only one or a few enumerated activities provide no Sabbatarian exception. Fla. Laws 1959, Special Acts, c. 59-1650, a local-option shop-closing statute applicable to Orange County, does contain such an exception, and in Michigan there are similar excepting clauses attached to barbering and auto-trading bans as well as to the general Sunday laws. Mich. Stat. Ann., 1957 Rev. Vol., §§ 18.122, 9.2702, Comp. Laws 1948, § 338.682; Comp. Laws Supp. 1956, § 435.252.
103. In Kansas, Massachusetts, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Dakota, Texas, Washington, and probably in Connecticut and Maine, the exception does not cover the sale of goods. Kan. Gen. Stat. Ann., 1949, § 21-953, State v. Haining, 1930, 131 Kan. 853, 293 P. 952; Mass. Gen. Laws Ann., 1958, c. 136, § 6, Commonwealth v. Has, 1877, 122 Mass. 40; Commonwealth v. Starr, 1887, 144 Mass. 359, 11 N.E. 533; Commonwealth v. Kirshen, 1907, 194 Mass. 151, 80 N.E. 2; Vernon's Mo. Stat. Ann., 1953, § 563.700; N.J. Stat. Ann., 1953 § 2A:171-4; McKinney's N.Y. Laws, Pen., Law, § 2144, People v. Friedman, 1950, 302 N.Y. 75, 96 N.E. 2d 184, appeal dismissed for want of a

substantial federal question, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345; cf. People v. Adler, 1916, 174 App. Div. 301, 160 N.Y.S. 539 (manufacturing activities); N.D. Century Code, 1960, § 12-21-17; R.I. Gen. Laws, 1956, § 11-40-4 (shops, mechanical work in compact places, etc.); S.D. Code, 1939, § 13.1710; Vernon's Tex. Stat., 1952, Pen. Code, Art. 284; Wash. Rev. Code, 1959, § 9.76.020, State v. Grabinski, 1949, 33 Wash. 2d 603, 206 P.2d 1022; Conn. Gen. Stat. Rev., 1958, § 53-303; Me. Rev. Stat., 1954, c. 134 § 44. Cf. State v. Weiss, 1906, 97 Minn. 125, 105 N.W. 1127. The exemption in Indiana, Kentucky, Michigan, Nebraska, Ohio, Oklahoma, Virginia and West Virginia does extend to selling, but in the last two named States an exempted person may not employ other persons not of his belief on Sunday. Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 10-4301; Ky. Rev. Stat., 1960, § 436.160, Cohen v. Webb, 1917, 175 Ky. 1, 192 S.W. 828; Mich. Stat. Ann., 1957 Rev. Vol., §§ 18.855, 18.856(1), Comp. Laws 1948, §§ 338.775, 435.8, Builders Ass'n v. City of Detroit, 1940, 295 Mich. 272, 294 N.W. 677, semble; Neb. Rev. Stat., 1956 Reissued Vol., § 28-940; Page's Ohio Rev. Code Ann., 1954, § 3773.24; Okla. Stat. Ann., 1958, Tit. 21, § 909, Krieger v. State, 1916, 12 Okla. Cr. 566, 160 P. 36; Va. Code, 1960 Replacement Vol., § 18.1-359; W. Va. Code Ann., 1955, c. 61, Art. 8, § 18 [6073]. The meaning of the provision in Illinois, Ill. Rev. Stat. 1959, c. 38, § 549, is not clear.

104. See 101 H.L. Deb. 430 (5th ser. 1935-1936); 311 H.C. Deb. 492 (5th ser. 1935-1936). On this ground some state courts have even held Sabbatarian exceptions invalid as discriminatory. City of Shreveport v. Levy, 1874, 26 La. Ann. 671; Kislingbury v. Treasurer of City of Plainfield, C.P. 1932, 160 A. 654, 10 N.J. Misc. 798. See State v. Grabinski, 1949, 33 Wash. 2d 603, 206 P.2d 1022, reserving the question. However, in Johns v. State, 1881, 78 Ind. 332, the exemption was sustained.
105. See Va. Code, 1960 Replacement Vol., § 18.1-359; W. Va. Code Ann., 1955, c. 61, Art. 8, § 18 [6073]; Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 91.

into private employment practices an element of religious differentiation which a legislature could regard as undesirable.¹⁰⁶

Finally, a relevant consideration which might cause a State's lawmakers to reject exception for observers of another day than Sunday is that administration of such a provision may require judicial inquiry into religious belief. A legislature could conclude that if all that is made requisite to qualify for the exemption is an abstinence from labor on some other day, there would be nothing to prevent an enterpriser from closing on his slowest business day, to take advantage of the whole of the profitable week-end trade, thereby converting the Sunday labor ban, in effect, into a day-of-rest-in-seven statute, with choice of the day left to the individual. All of the state exempting statutes seem to reflect this consideration. Ten of them require that a person claiming exception "conscientiously" believe in the sanctity of another day or "conscientiously" observe another day as the Sabbath.¹⁰⁷ Five demand that he keep another day as "holy time."¹⁰⁸ Three allow the exemption only to members of a "religious" society observing another day,¹⁰⁹ and a fourth provides for proof of membership in such a society by the certificate of a preacher or of any three adherents.¹¹⁰ In Illinois the claimant must observe some day as a "Sabbath," and in New Jersey he must prove that he devotes that day to religious exercises.¹¹¹ Connecticut, one of the jurisdictions demanding conscientious belief, requires in addition that he who seeks the benefit of the exception file a notice of such belief with the prosecuting attorney.¹¹²

106. Both Pennsylvania and Massachusetts have fair employment practices acts prohibiting religious discrimination in hiring. *Purdon's Pa. Stat. Ann.*, 1960 Supp., Tit. 43, §§ 951 to 963; *Mass. Gen. Laws Ann.*, 1958, c. 151B, §§ 1 to 10.
107. Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Ohio, Texas, Virginia, West Virginia. Wisconsin's statute is similar.
108. New York, North Dakota, Oklahoma, South Dakota, Washington.
109. Kansas, Kentucky, Missouri.
110. Rhode Island.
111. This New Jersey excepting statute appears to be currently inoperative. The State's general labor ban has recently been held impliedly repealed by the enactment of a Sunday retail sales prohibition, *Two Guys from Harrison, Inc., v. Furman*, 1960, 32 N.J. 199, 160 A.2d 265, and the excepting provision, by its terms, does not extend to Sunday selling by Sabbatarians.
112. And see *In re Berman*, 1956, 344 Mich. 598, 75 N.W.2d 8, determining the posture under a conscientious-Sabbatarian exemption of a Sabbatarian

Indicative of the practical administrative difficulties which may arise in attempts to effect, consistently with the purposes of Sunday closing legislation, an exception for persons conscientiously observing another day as Sabbath, are the provisions of § 53 of the British Shops Act, 1950,¹¹³ continuing in substance § 7 of the Shops (Sunday Trading Restriction) Act, 1936.¹¹⁴ These were the product of experience with earlier forms of exemptions which had proved unsatisfactory,¹¹⁵ and the new 1936 provisions were enacted only after the consideration and rejection of a number of proposed alternatives.¹¹⁶ They allow shops which are registered under the section and which remain closed on Saturday to open for trade until 2 p. m. on Sunday. Applications for registration must contain a declaration that the shop occupier "conscientiously objects on religious grounds to carrying on trade or business on the Jewish Sabbath,"¹¹⁷

owner of three stores who operated one himself, closing on Saturdays and opening on Sundays, and the other two through agents, opening Saturdays and closing Sundays.

113. 14 Geo. VI, c. 28.
114. 26 Geo. V & 1 Edw. VIII, c. 53.
115. Principally the Jewish exemption in the Hair-dressers' and Barbers' Shops (Sunday Closing) Act, 1930, 20 & 21 Geo. V, c. 35, § 3. See 101 H.L. Deb. 439, 442 (5th ser. 1935-1936); 311 H.C. Deb. 502 (5th ser. 1935-1936). The 1930 act was repealed by the Shops Act, 1950, 14 Geo. VI, c. 28, Eighth Schedule, although § 67 of the latter act continues similar provisions for Scotland. The problem of special Sunday regulation for the Jewish Population had involved Parliament at least since the turn of the century. Sections 47, 48 of the Factory and Workshop Act, 1901, 1 Edw. VII, c. 22, permitted Jewish employers certain exemptions from that act's prohibition of Sunday employment of women and children. The terms of the exemption are altered by the Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 91. See also Report from the Select Committee of the House of Lords on the Sunday Closing (Shops) Bill [H.L.] (1905), 71-83, 142-147, 153-157.
116. Among these was a provision permitting any shopkeeper in London to elect to close on Saturdays instead of Sundays. See 311 H.C. Deb. 447-461 (5th ser. 1935-1936). The Jewish exemption provisions of § 7 were the most strenuously debated provisions of the Shops (Sunday Trading Restriction) Act. See 308 H.C. Deb. 2188-2192, 2202-2203, 2217 (5th ser. 1935-1936); 101 H.L. Deb. 263, 270, 427-434 (5th ser. 1935-1936); 311 H.C. Deb. 447-461, 478-507 (5th ser. 1935-1936). The recognized inadequacy of the exemption was in part responsible for the act's special provisions (§ 8) for the London area, where the bulk of the English Jewish trading population does business. *Id.*, at 2087, 2090-2091, 2103-2104.
117. See the statutory form prescribed by the Shops Regulations, 1937, S. R. & O., 1937, No. 271, Schedules IV(a) and IV(b).

and any person who, to procure registration, "knowingly or recklessly makes an untrue statement or untrue representation," is subject to fine and imprisonment. Whenever upon representations made to them the local authority find reason to believe that a registered occupier is not a person of the Jewish religion or "that a conscientious objection on religious grounds . . . is not genuinely held," the authority may furnish particulars of the case to a tribunal established after consultation with the London Committee of Deputies of the British Jews,¹¹⁸ which tribunal, if in their opinion the occupier is not a person of the Jewish religion or does not genuinely hold a conscientious objection to trade on the Jewish Sabbath, shall so report to the local authority; and upon this report the occupier's registration is to be revoked.¹¹⁹ Surely, in light of the delicate enforcement problems to which these provisions bear witness, the legislative choice of a blanket Sunday ban applicable to observers of all faiths cannot be held unreasonable. A legislature might in reason find that the alternatives of exempting Sabbatarians would impede the effective operation of the Sunday statutes, produce harmful collateral

effects, and entail, itself, a not inconsiderable intrusion into matters of religious faith. However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it.

It cannot, therefore, be said that Massachusetts and Pennsylvania have imposed gratuitous restrictions upon the Sunday activities of persons observing the Orthodox Jewish Sabbath in achieving the legitimate secular ends at which their Sunday statutes may aim. The remaining question is whether the importance to the public of those ends is sufficient to outweigh the restraint upon the religious exercise of Orthodox Jewish practicers which the restrictions entail. See *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645; *Cox v. State of New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049. The nature of the legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society. The right to this release has been claimed by workers and by small enterprisers, especially by retail merchandisers, over centuries, and finds contemporary expression in legislation in three-quarters of the States. The nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith.

These statutes do not make criminal, do not place under the onus of civil or criminal disability, any act which is itself prescribed by the duties of the Jewish or other religions. They do create an undeniable financial burden upon the observers of one of the fundamental tenets of certain religious creeds, a burden which does not fall equally upon other forms of observance. This was true of the tax which this Court held an unconstitutional infringement of the free exercise of religion in *Follett v. Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938. But unlike the tax in *Follett*, the burden which the Sunday statutes impose is an incident of the only feasible means to achievement of their particular goal. And again unlike *Follett*, the measure of the burden is not determined by fixed legislative decree, beyond the power of the individual to alter. Upon persons who earn their livelihood by activities not prohibited on Sun-

118. The constitution of the tribunals for Jews and for Seventh Day Adventists (see note 119, *infra*) and the procedures of the tribunals are prescribed by the Shops Regulations, 1937, S. R. & O., 1937, No. 271, Reg. 4, and the Shops (Procedure for Jewish Tribunals) Regulations, 1937, S. R. & O., 1937, No. 1038.

119. Other provisions indicate the intricate problems of administration which the exemption raises. Section 53(3) provides that in the case of shops occupied by a partnership or company the application of the exemption is determined by the religion of the majority of the partners or directors. Section (5) prohibits the occupier of a shop registered for the exemption from keeping open any other shop on Saturday, and prohibits any person who has made a statutory declaration of conscientious objection for purposes of registration from working in, or employing any other person in, or being concerned in the control of a firm which employs any other person in, a shop open on Saturday. Compare *In re Berman*, note 112, *supra*. Subsection (9) permits cancellation of the registration of any shop at the application of the occupier, but provides that registration shall not be cancelled within twelve months of the date upon which application for registration was made; and subsection (10) precludes the same occupier's again registering the shop for exemption. Section 53(12) makes the exception provisions applicable as well as members of any religious body regularly observing the Jewish Sabbath as to Jews, and provides that for such persons the function served in the case of Jews by the London Committee of Deputies of the British Jews shall be served by "such body as appears to the Secretary of State to represent such persons."

day, and upon those whose jobs require only a five-day week, the burden is not considerable. Like the customers of Crown Kosher Super Market in the Gallagher case, they are inconvenienced in their shopping. This is hardly to be assessed as an injury of preponderant constitutional weight. The burden on retail sellers competing with Sunday-observing and non-observing retailers is considerably greater. But, without minimizing the fact of this disadvantage, the legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant. More is demanded of him, admittedly, whether in the form of additional labor or of material sacrifices, than is demanded of those who do not choose to keep his Sabbath. More would be demanded of him, of course, in a State in which there were no Sunday laws and in which his competitors chose—like Two Guys from Harrison—to do business seven days a week. In view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the nonexempting Sunday statutes an impermissible imposition upon the Sabbatarian's religious freedom? Every court which has considered the question during a century and a half has concluded that it is

not.¹²⁰ This Court so concluded in *Friedman v. People of State of New York*, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345. On the basis of the criteria for determining constitutionality, as opposed to what one might desire as a matter of legislative policy, a contrary conclusion cannot be reached.

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120. *Frolickstein v. Mayor of Mobile*, 1867, 40 Ala. 725; *Scales v. State*, 1886, 47 Ark. 476, 1 S.W. 769; *State v. Haining*, 1930, 131 Kan. 853, 293 P. 952; *Commonwealth v. Has*, 1877, 122 Mass. 40; *Commonwealth v. Chernock*, 1957, 336 Mass. 384, 145 N.E.2d 920; *State v. Weiss*, 1906, 97 Minn. 125, 105 N.W. 1127; *Komen v. City of St. Louis*, 1926, 316 Mo. 9, 289 S.W. 838 (subsequently overruled on another point); *State v. Fass*, County Ct. 1960, 62 N.J. Super. 265, 162 A.2d 608; *People v. Friedman*, 1950, 302 N.Y. 75, 96 N.E. 2d 184, appeal dismissed for want of a substantial federal question, 341 U.S. 907, 71 S.Ct. 623, 95 L.Ed. 1345; *Silverberg Bros. v. Douglass*, 1909, 62 Misc. 340, 114 N.Y.S. 824; *Commonwealth v. Wolf*, 1817, 3 Serg. & R., Pa., 48; *Specht v. Commonwealth*, 1848, 8 Pa. 312; *City Council of Charleston v. Benjamin*, S.C. 1848, 2 Strob. L. 508; *Xepapas v. Richardson*, 1929, 149 S.C. 52, 146 S.E. 686 *semble*; *State v. Bergfeldt*, 1905, 41 Wash. 234, 83 P. 177, writ of error dismissed 210 U.S. 438, 28 S.Ct. 764, 52 L.Ed. 1138 (prohibiting barbering). And see *State ex rel. Walker v. Judge*, 1887, 39 La. Ann. 132, 141, 1 So. 437, 444; *cf. Ex parte Sundstrom*, 1888, 25 Tex. App. 133, 8 S.W. 207.

Douglas Dissent in All Sunday Closing Cases

Mr. Justice DOUGLAS, dissenting.

The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority.

If the "free exercise" of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws "respecting the establishment of religion" were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with any one's free exercise of religion and took no step toward a burdensome establishment of any religion.

But that is not the premise from which we

start, as there is agreement that the fact that a State, and not the Federal Government, has promulgated these Sunday laws does not change the scope of the power asserted. For the classic view is that the First Amendment should be applied to the States with the same firmness as it is enforced against the Federal Government. See *Lovell v. City of Griffin*, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949; *Minersville School District v. Gobitis*, 310 U.S. 586, 593, 60 S.Ct. 1010, 1012, 84 L.Ed. 1375; *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 108, 63 S.Ct. 870, 872, 87 L.Ed. 1292; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628; *Staub v. City of Baxley*, 355 U.S. 313, 321, 78 S.Ct. 277, 281, 2 L.Ed.2d 302; *Talley v. State of California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559. The most explicit statement perhaps was in *West Virginia State Board of Education v. Barnette*, *supra*, 319 U.S. 639, 63 S.Ct. 1186.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

With that as my starting point I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the state is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration of Independence stated the now familiar theme:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

And the body of the Constitution as well as the Bill of Rights enshrined those principles.

The Puritan influence helped shape our constitutional law and our common law as Dean

Pound has said: The Puritan "put individual conscience and individual judgment in the first place." *The Spirit of the Common Law* (1921), p. 42. For these reasons we stated in *Zorach v. Claiborn*, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954, "We are a religious people whose institutions presuppose a Supreme Being."

But those who fashioned the Constitution decided that if and when God is to be served, His service will not be motivated by coercive measures of government. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—such is the command of the First Amendment made applicable to the state by reason of the Due Process Clause of the Fourteenth. This means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government. This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the state may not require anyone to practice a religion or even any religion; and *fourth*, that the state cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters (*West Virginia State Board of Education v. Barnette*, supra; *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish—whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral. This freedom plainly includes freedom from religion with the right to believe, speak, write, publish and advocate antireligious programs. *West Virginia State Board of Education v. Barnette*, supra, 319 U.S. 641, 63 S.Ct. 1186. Certainly the "free exercise" clause does not require that everyone embrace the theology of some church or of some faith, or observe the

religious practices of any majority or minority sect. The First Amendment by its "establishment" clause prevents, of course, the selection by government of an "official" church. Yet the ban plainly extends farther than that. We said in *Everson v. Board of Education*, 330 U.S. 1, 16, 67 S.Ct. 504, 511, 91 L.Ed. 711, that it would be an "establishment" of a religion if the government financed one church or several churches. For what better way to "establish" an institution than to find the fund that will support it? The "establishment" clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it. The Government plainly could not join forces with one religious group and decree a universal and symbolic circumcision. Nor could it require all children to be baptized or give tax exemptions only to those whose children were baptized.

Could it require a fast from sunrise to sunset throughout the Moslem month of Ramadan? I should think not. Yet why then can it make criminal the doing of other acts, as innocent as eating, during the day that Christians revere?

Sunday is a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization that color all judgments concerning it. This is what the philosophers call "word magic."

"For most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe." Cohen, *Legal Conscience* (1960), p. 169.

The issue of these cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays? Would the rest of us have to submit under the fear of criminal sanctions?

Dr. John Cogley recently summed up¹ the

1. *The Problems of Pluralism*, Danforth Lectures, Miami University, Oxford, Ohio (1960). Other writers suggest that America is still subject to a

dominance of the three-religion influence in our affairs:

"For the foreseeable future, it seems, the United States is going to be a three-religion nation. At the present time all three are characteristically 'American' some think flavorlessly so. For religion in America is almost uniformly 'respectable,' bourgeois, and prosperous. In the Protestant world the 'church' mentality has triumphed over the more venturesome spirit of the 'sect.' In the Catholic world, the mystical is muted in favor of booming organization and efficiently administered good works. And in the Jewish world the prophet is too frequently without honor, while the synagogue emphasis is focused on suburban togetherness. There are exceptions to these rules, of course; each of the religious communities continues to cast up its prophets, its rebels and radicals. But a Jeremiah, one fears, would be positively embarrassing to the present position of the Jews; a Francis of Assisi upsetting the complacency of American Catholics would be rudely dismissed as a fanatic; and a Kierkegaard, speaking with an American accent, would be considerably less welcome than Norman Vincent Peale in most Protestant pulpits."

This religious influence has extended far, far back of the First and Fourteenth Amendments. Every Sunday School student knows the Fourth Commandment:

"Remember the sabbath day, to keep it holy."

customary and nonlegal "protestant establishment" which comes to the surface only on certain political issues. Thus, a Rabbi Arthur Hartzberg was able to analyze the "religious issue" of the recent presidential campaign in these terms:

"As we have seen, the First Amendment was the battleground, at the end of the 18th century, of a major transition in American society in which the old Protestant establishment was forced to yield to the newer ethos of Protestant non-conformity. Today in American society, we are witnessing a change perhaps as important—the full entry of the post-bellum immigrant groups into the national life. Though the battle once again seems to be raging around the First Amendment, it would appear from the foregoing analysis that the true issue is not the separation of church and state, but the symbolic significance for American life and culture of having a non-Protestant—whether he be a Catholic, a Jew, or an avowed atheist—as President of the United States." Hartzberg, "The Protestant 'Establishment,' Catholic Dogma, and the Presidency," *Commentary* (October 1960), p. 285.

"Six days shalt thou labour, and do all thy work:

"But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates:

"For in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the sabbath day, and hallowed it." Exodus 20:8-11.

This religious mandate for observance of the Seventh Day became, under Emperor Constantine, a mandate for observance of the First Day "in conformity with the practice of the Christian Church." See *Richardson v. Goodard*, 23 How. 28, 41, 16 L.Ed. 412. This religious mandate has had a checkered history, but in general its command, enforced now by the ecclesiastical authorities, now by the civil authorities, and now by both, has held good down through the centuries.² The general pattern of these laws in the United States was set in the eighteenth century and derives, most directly, from a seventeenth century English statute. 29 Charles II, c. 7. Judicial comment on the Sundays laws has always been a mixed bag. Some judges have asserted that the statutes have a "purely" civil aim, i.e., limitation of work time and provision for a common and universal leisure. But other judges have recognized the religious significance of

Sunday and that the laws existed to enforce the maintenance of that significance. In general, both threads of argument have continued to interweave in the case law on the subject. Prior to the time when the First Amendment was held applicable to the States by reason of the Due Process Clause of the Fourteenth, the Court at least by *obiter dictum* approved State Sunday laws on three occasions: *Soon Hing v. Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145, in 1885; *Hennington v. State of Georgia*, 163 U.S. 299, 16 S. Ct. 1086, 41 L.Ed. 166, in 1896; *Petit v. State of Minnesota*, 177 U.S. 164, 20 S.Ct. 666, 44 L.Ed. 716, in 1900. And in *Friedman v. People of State of New York*, 341 U.S. 907, 71 S.Ct. 623, 95 L. Ed. 1345, the Court, by a divided vote, dismissed³ "for the want of a substantial federal question" an appeal from a New York decision upholding the validity of a Sunday law against an attack based on the First Amendment.

The *Soon Hing*, *Hennington*, and *Petit* cases all rested on the police power of the State—the right to safeguard the health of the people by requiring the cessation of normal activities one day out of seven. The Court in the *Soon Hing* case rejected the idea that Sunday laws rested on the power of government "to legislate for the promotion of religious observances." 113 U.S. at page 710, 5 S.Ct. at page 734. The New York Court of Appeals in the *Friedman* case followed the reasoning of the earlier cases,⁴ 302 N.Y. 75, 80, 96 N.E.2d 184, 186.

The Massachusetts Sunday law involved in one of these appeals was once characterized by the Massachusetts court as merely a civil regulation providing for a "fixed period of rest." *Commonwealth v. Has*, 122 Mass. 40, 42. That decision was, according to the District Court in the *Gallagher* case, "an *ad hoc* improvisation"

2. Blackstone's Commentaries, Bk. IV, c. 4, entitled "Of Offenses Against God and Religion" says in part:

"Profanation of the Lord's day, vulgarly (but improperly) called *sabbath-breaking*, is a ninth offense against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which usually follows it's profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: It enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: It imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker."

3. See also *Ullner v. State of Ohio*, 358 U.S. 131, 79 S.Ct. 230, 3 L.Ed.2d 225; *Kidd v. State of Ohio*, 358 U.S. 132, 79 S.Ct. 235, 3 L.Ed.2d 225; *McGee v. State of North Carolina*, 346 U.S. 802, 74 S.Ct. 50, 98 L.Ed. 334; cf. *Grochowiak v. Commonwealth of Pennsylvania*, 358 U.S. 47, 79 S.Ct. 40, 3 L.Ed.2d 44; *Gundaker Cent. Motors, Inc., v. Gassert*, 354 U.S. 933, 77 S.Ct. 1397, 1 L.Ed.2d 1533; *Towery v. State of North Carolina*, 347 U.S. 925, 74 S.Ct. 532, 98 L.Ed. 1079.

4. As respects the First Amendment the court said: "It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion." 302 N.Y. at page 79, 96 N.E.2d at page 186.

made "because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state Constitution if the religious motivation of the statute were more explicitly avowed." 176 F.Supp. 466, 473. Certainly prior to the Has case, the Massachusetts courts had indicated that the aim of the Sunday law was religious. See *Pearce v. Atwood*, 13 Mass. 324, 345-346; *Bennett v. Brooks*, 91 Mass. 118, 121. After the Has case the Massachusetts court construed the Sunday law as a religious measure. In *Davis v. City of Somerville*, 128 Mass. 594, 596, 35 Am. Rep. 399, 400, it was said:

"Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time."

And see *Commonwealth v. Dextra*, 143 Mass. 28, 8 N.E. 756. In *Commonwealth v. White*, 190 Mass. 578, 581, 77 N.E. 636, 637, 5 L.R.A., N.S., 320, the court refused to liberalize its construction of an exception in its Sunday law for works of "necessity." That word, it said, "was originally inserted to secure the observance of the Lord's day in accordance with the views of our ancestors, and it ever since has stood and still stands for the same purpose." In *Commonwealth v. McCarthy*, 244 Mass. 484, 486, 138 N.E. 835, 836, the court reiterated that the aim of the law was "to secure respect and reverence for the Lord's day."

The Pennsylvania Sunday laws before us in Nos. 36 and 67 have received the same construction. "Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere worldly employment, are exactly what the statute was passed to protect." *Sparhawk v. Union Passenger R. Co.*, 54 Pa. 401, 423. And see *Commonwealth v. Nesbit*, 34 Pa. 398, 405, 406-408. A recent pronouncement by the Pennsylvania Supreme Court is found in *Commonwealth ex rel. v. American Baseball Club*, 290 Pa. 136, 143, 138 A. 497, 499, 53 A.L.R. 1027: "Christianity is part of the common law of Pennsylvania * * * and

its people are Christian people. Sunday is the holy day among Christians."

The Maryland court in sustaining the challenged law in No. 8 relied on *Judefind v. State*, 78 Md. 510, 28 A. 405, 22 L.R.A. 721, and *Levering v. Board of Park Commissioner*,⁵ 134 Md. 48, 106 A. 176, 4 A.L.R. 374. In the former the court said:

"It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion, of all sects and denominations that observe that day, as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, except works of necessity and charity, and *thereby* promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest, (as it undoubtedly is,) there is all the more reason for the enforcement of laws that help to preserve it." 78 Md., at pages 515-516, 28 A. at page 407.

In the *Levering* case the court relied on the excerpt from the *Judefind* decision just quoted. 134 Md. at pages 54-56, 106 A. at pages 178-179.

We have then in each of the four cases Sunday laws that find their source in Exodus, that were brought here by the Puritans, and that are today maintained, construed, and justified because they respect the views of our dominant religious groups and provide a needed day of rest.

The history was accurately summarized a century ago by Chief Justice Terry of the Supreme Court of California in *Exparte Newman*, 9 Cal. 502, 509.

"The truth is, however much it may be disguised, that this one day of rest is a purely religious idea. Derived from the Sabbatical institutions of the ancient Hebrew, it has been adopted into all the creeds of succeeding religious sects throughout the civilized world; and whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the

5. *Cf. Bowman v. Secular Society, Ltd.* [1917] A.C. 406, 464 (opinion of Lord Sumner).

Christian, it is alike fixed in the affections of its followers, beyond the power of eradication, and in most of the States of our Confederacy, the aid of the law to enforce its observance has been given under the pretense of a civil, municipal, or police regulation."

That case involved the validity of a Sunday law under a provision of the California Constitution guaranteeing the "free exercise" of religion. Calif. Const., 1849, Art. I, § 4. Justice Burnett stated why he concluded that the Sunday law, there sought to be enforced against a man selling clothing on Sunday, infringed California's constitution:

"Had the act made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same. The fact that the Christian *voluntarily* keeps holy the first day of the week, does not authorize the Legislature to make that observance *compulsory*. The Legislature can not compel the citizen to do that which the Constitution leaves him free to do or omit, at his election. The act violates as much the religious freedom of the Christian as of the Jew. Because the conscientious views of the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship, and assumes the power to compel him to do that which he has the right to omit if he pleases. The principle is the same, whether the act of the Legislature *compels* us to do that which we wish to do, or not to do. * *

"Under the Constitution of this State, the Legislature can not pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When, therefore, the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything, because it violates simply a religious principle or observance, the act is unconstitutional." *Id.*, at pages 513-515.

The Court picks and chooses language from various decisions to bolster its conclusion that these Sunday Laws in the modern setting are "civil regulations." No matter how much is

written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities.⁶ After all, the labels a State places on its laws are not binding on us when we are confronted with a constitutional decision. We reach our own conclusion as to the character, effect, and practical operation of the regulation in determining its constitutionality. *Carpenter v. Shaw*, 280 U.S. 363, 367-368, 50 S.Ct. 121, 122-123, 74 L.Ed. 478; *State ex rel. Dyer v. Sims*, 341 U.S. 22, 29, 71 S.Ct. 557, 561, 95 L.Ed. 713; *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 392, 72 S.Ct. 424, 426, 96 L.Ed. 436; *Society for Savings in City of Cleveland, Ohio v. Bowers*, 349 U.S. 143, 151, 75 S.Ct. 607, 99 L.Ed. 950; *Gomillion v. Lightfoot*, 364 U.S. 339, 341-342, 81 S.Ct. 125, 127, 5 L.Ed.2d 110.

It seems to me plain that by these laws the States compel one, under sanction of law, to refrain from work or recreation on Sunday because of the majority's religious views about that day. The State by law makes Sunday a symbol of respect or adherence. Refraining from work or recreation in deference to the majority's religious feelings about Sunday is within every person's choice. By what authority can government compel it?

Cases are put where acts that are immoral by our standards but not by the standards of other religious groups are made criminal. That category of cases, until today, has been a very restricted one confined to polygamy (*Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244) and other extreme situations. The latest example is

6. Today we retreat from that jealous regard for religious freedom which struck down a statute because it was "a handy implement for disguised religious persecution." *West Virginia State Board of Education v. Barnette*, supra, 319 U.S. 644, 63 S.Ct. 1188 (concurring opinion). It does not do to say, as does the majority, "Sunday is a day apart from all others. The cause is irrelevant; the fact exists." The cause of Sunday's being a day apart is determinative; that cause should not be swept aside by a declaration of parochial experience.

The judgment the Court is called upon to make is a delicate one. But in the light of our society's religious history it cannot be avoided by arguing that a hypothetical lawgiver could find nonreligious reasons for fixing Sunday as a day of rest. The effect of that history is, indeed, still with us. Sabbath is no less Sabbath because it is now less severe in its strictures, or because it has come to be expedient for some nonreligious purposes. The Constitution must guard against "sophisticated as well as simple-minded modes" of violation. *Lane v. Wilson*, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281.

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, which upheld a statute making it criminal for a child under twelve to sell papers, periodicals, or merchandise on a street or in any public place. It was sustained in spite of the finding that the child thought it was her religious duty to perform the act. But that was a narrow holding which turned on the effect which street solicitation might have on the child-solicitor:

"The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action." *Id.*, 321 U.S. 168-169, 64 S.Ct. 443.

None of the acts involved here implicates minors. None of the actions made constitutionally criminal today involves the doing of any act that any society has deemed to be immoral.

The conduct held constitutionally criminal today embraces the selling of pure, not impure, food; wholesome, not noxious articles. Adults, not minors, are involved. The innocent acts, now constitutionally classified as criminal, emphasize the drastic break we make with tradition.

These laws are sustained because, it is said, the First Amendment is concerned with religious convictions or opinion, not with conduct. But it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs. Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem

to some, are within the ambit of the First Amendment. See *United States v. Ballard*, 322 U.S. 78, 87, 64 S.Ct. 882, 888, 88 L.Ed. 1148. Is it possible that a majority of a state legislature having those religious scruples could make it criminal for the nonbeliever to sell pork? Some have religious scruples against slaughtering cattle. Could a state legislature, dominated by that group, make it criminal to run an abattoir?

The Court balances the need of the people for rest, recreation, late-sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. I see no place for it in the constitutional scheme. A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause. Any other reading imports, I fear, an element common in other societies but foreign to us. Thus Nigeria in Article 23 of her Constitution, after guaranteeing religious freedom, adds, "Nothing in this section shall invalidate any law that is reasonably justified in a democratic society in the interest of defence, public safety, public order, public morality, or public health." And see Article 25 of the Indian Constitution. That may be a desirable provision. But when the Court adds it to our First Amendment, as it does today, we make a sharp break with the American ideal of religious liberty as enshrined in the First Amendment.

The State can of course require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement.⁷ Then the "day of rest" becomes purely

7. Or the State may merely fix a maximum hours limitation in other terms, either for particular classes of employees, particular classes of employment, or straight across the board. See laws and decisions gathered in 1 & 2 CCH Labor Law Reporter, State Laws, par. 44,500 et seq. On argument, there was much made over the desirability of fixing a single day for rest, either on grounds of administrative convenience or on grounds of the need for leisure. In light of the history and meaning of the shared leisure of Sunday, this aim still has religious overtones. Cf. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505, 72 S.Ct. 777, 782, 96 L.Ed. 1098.

and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed, if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as their Sabbath a day other than Sunday.

When these laws are applied to Orthodox Jews, as they are in No. 11 and No. 67, or to Sabbatarians their vice is accentuated. If the Sunday laws are constitutional, Kosher markets are on a five-day week. Thus those laws put an economic penalty on those who observe Saturday rather than Sunday as the Sabbath. For the economic pressures on these minorities, created by the fact that our communities are predominantly Sunday-minded, there is no recourse. When, however, the State uses its coercive powers—here the criminal law—to compel minorities to observe a second Sabbath, not their own, the State undertakes to aid and "prefer one religion over another"—contrary to the command of the Constitution. See *Everson v. Board of Education*, supra, 330 U.S. 15, 67 S.Ct. 511.

In large measure the history of the religious clause of the First Amendment was a struggle to be free of economic sanctions for adherence to one's religion. *Everson v. Board of Education*, supra, 330 U.S. 11-14, 67 S.Ct. 509-510. A small tax was imposed in Virginia for religious education. Jefferson and Madison led the fight against the tax, Madison writing his famous Memorial and Remonstrance against that law. Id., 330 U.S. 12, 67 S.Ct. 509. As a result, the tax measure was defeated and instead Virginia's famous "Bill for Religious Liberty," written by Jefferson, was

enacted. Id., 330 U.S. 12, 67 S.Ct. 510. That Act provided:⁸

"That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief"

The reverse side of an "establishment" is a burden on the "free exercise" of religion. Receipt of funds from the state benefits the established church directly; laying an extra tax on nonmembers benefits the established church indirectly. Certainly the present Sunday laws place Orthodox Jews and Sabbatarians under extra burdens because of their religious opinions or beliefs. Requiring them to abstain from their trade or business on Sunday reduces their work-week to five days, unless they violate their religious scruples. This places them at a competitive disadvantage and penalizes them for adhering to their religious beliefs.

"The sanction imposed by the state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax for preaching,"⁹ which we struck down in *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and in *Follett v. Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938. The special protection which Sunday laws give the dominant religious groups and the penalty they place on minorities whose holy day is Saturday constitute in my view state interference with the "free exercise" of religion.¹⁰

8. 12 Hennings, Stat. Va. (1823), p. 86.

9. Pfeffer, Church, State, and Freedom (1953), p. 235.

10. " . . . assuming that the idle Sunday is an 'institution' of Christianity, does a statute which for that reason requires men to be idle on Sunday give a preference to one particular religion? How can it be maintained that it does not, unless a similar institution of every other religion be honored with like recognition? As to the individual aspect of the case, if the law is to assist Christianity by making idleness compulsory on its sacred day, thereby presumably commending it to those who reject it, and strengthening its hold upon its devotees, is there not a 'preference' given to a religion, unless the Hebrew and all other faiths have a like recognition extended to their sacred days? And as to the social aspect, assuming that it is an advantage to have other people kept extraordinarily quiet while we pray, and to have an especial 'peace' established by law on the day we select for public worship, and that we have the right to prevent our neighbor from earning his living at a certain time because the practice of his avocation inter-

I dissent from applying criminal sanctions against any of these complainants since to do so implicates the States in religious matters contrary to the constitutional mandate.¹¹ Allan C. Parker, Jr., Pastor of the South Park Presbyterian Church, Seattle, Washington, has stated my views:

"We forget that, though Sunday-worshipping Christians are in the majority in this country among religious people, we do not have the right to force our practice upon the minority. Only a Church which deems itself without error and intolerant of error can justify its intolerance of the minority.

"A Jewish friend of mine runs a small business establishment. Because my friend is a Jew he closes his store voluntarily so

feres with our religious exercises, must it not be called a 'preference' to do all this for the Christian's benefit, and not to do it for the benefit of the followers of Moses, or Mahomet, or Confucius or Buddha?" Ringgold, *Legal Aspects of the First Day of the Week* (1891), pp. 68-69.

11. It is argued that the wide acceptance of Sunday laws at the time of the adoption of the First Amendment makes it fair to assume that they were never thought to come within the "establishment" Clause, and that the presence in the country at that time of large numbers of Orthodox Jews makes it clear that those laws were not thought to run afoul of the "free exercise" Clause. Those reasons would be compelling if the First Amendment had, at the time of its adoption, been applicable to the States. But since it was then applicable only to the Federal Government, it had no possible bearing on the Sunday laws of the States. The Fourteenth Amendment, adopted years later, made the First Amendment applicable to the States for the first time. That Amendment has had unsettling effects on many customs and practices—a process consistent with Jefferson's precept "that laws and institutions must go hand in hand with the progress of the human mind." 15 *The Writings of Thomas Jefferson* (Memorial ed. 1904), p. 41.

that he will be able to worship his God in his fashion. Fine! But, as a Jew living under Christian inspired Sunday closing laws, he is required to close his store on Sunday so that I will be able to worship my God in my fashion.

"Around the corner from my church there is a small Seventh Day Baptist church. I disagree with the Seventh Day Baptists on many points of doctrine. Among the tenets of their faith with which I disagree is the 'seventh day worship.' But they are good neighbors and fellow Christians, and while we disagree we respect one another. The good people of my congregation set aside their jobs on the first of the week and gather in God's house for worship. Of course, it is easy for them to set aside their jobs since Sunday closing laws—inspired by the Church—keep them from their work. At the Seventh Day Baptist church the people set aside their jobs on Saturday to worship God. This takes real sacrifice because Saturday is a good day for business. But that is not all—they are required by law to set aside their jobs on Sunday while more orthodox Christians worship. * * *

"I do not believe that because I have set aside Sunday as a holy day I have the right to force all man to set aside that day also. Why should my faith be favored by the State over any other man's faith?"¹²

With all deference none of the opinions filed today in support of the Sunday laws have answered that question.

12. 1 *Liberty*, January-February 1961, pp. 21-22.

MISCELLANEOUS ORDERS

The United States Supreme Court

Affirmed, Per Curiam:

Denny v. Bush (Prior decision 190 F.Supp. 861, 5 Race Rel. L. Rep. 1023 [E.D. La. 1960]). No. 868, June 19, 1961, 81 S.Ct. 1917 order: "The motion to affirm is granted and the judgment is affirmed." See also 6 Race Rel. L. Rep. 413, *infra*.

Legislature of Louisiana v. United States (prior decision 190 F.Supp. 861, 5 Race Rel. L. Rep. 1023 [E.D. La. 1960]). No. 967, June 19, 1961, 81 S.Ct. 1925 order: "The motion to affirm is granted and the judgment is affirmed." See also 6 Race Rel. L. Rep. 413, *infra*.

City of New Orleans v. Bush (Prior decision 190 F.Supp. 861, 5 Race Rel. L. Rep. 1023 [E.D. La. 1960]). No. 812, May 8, 1961, 81 S.Ct. 1091, order: "The motion to affirm is granted and the judgment is affirmed." See also 6 Race Rel. L. Rep. 413, *infra*.

Tugwell v. Bush (Prior decision 190 F.Supp. 861, 5 Race Rel. L. Rep. 1023 [E.D. La. 1960]). No. 1037, June 19, 1961, 81 S.Ct. 1926 order: "The judgment is affirmed." See also 6 Race Rel. L. Rep. 413, *infra*.

Reversed, Per Curiam:

Anderson v. Alabama (Prior decision 120 So.2d 397, 5 Race Rel. L. Rep. 490 [Ala. Court of Appeals, 1959] affirming the conviction of a Negro upon determining that he had failed to carry his burden of proving that the jury commissioners of the county wherein he was indicted and tried have a scheme for excluding Negroes from the rolls, and accordingly rejecting his contention that at the times of his indictment and trial there was systematic exclusion of Negroes from the county grand and petit juries in denial of his constitutional right to equal protection of the laws). No. 326, May 1, 1961, 81 S.Ct. 1050, order: "The judgment is reversed. *Pierre v. Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L. Ed. 866."

Dismissed on Appeal:

Great Cove Realty Co. Inc. v. Brenner (Prior decision 9 A.D.2d 948, 195 N.Y.S.2d 935 [N.Y. Supreme Court, Appellate Division, Second Department, 1959] holding that an order of a New York county court [under Section 8 of New York Indian Law prescribing a summary procedure for ousting intruders on Indian lands], which found that a realty company and a construction company were intruders on reservation lands of the Shinnecock Indian Tribe and directed issuance of a removal warrant to the county sheriff, was based on a finding of fact on a disputed title question not against the weight of credible evidence). Questions presented on appeal: Does the statutory provision exceed the state's police power and unconstitutionally encroach upon the United States paramount jurisdiction over affairs of Indian tribes? And, does the statute violate the due process and equal protection clauses of the Fourteenth Amendment? No. 675, April 17, 1961, 81 S.Ct. 911, order: "The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." Mr. Justice BLACK and Mr. Justice DOUGLAS are of the opinion that probable jurisdiction should be noted.

Granted Certiorari:

Gibson v. Florida Legislative Investigation Committee (Prior decision 126 So.2d 129, 6 Race Rel. L. Rep. 244 [Fla. Supreme Court, 1960] affirming the contempt conviction of the Dade County, Florida, NAACP chapter president for refusing to bring before a state legislative investigation committee the chapter membership list, because he was required only to have the list from which to testify as to associational status of specific members otherwise identified as having subversive connections) No. 835, May 8, 1961, 81 S.Ct. 1093. Other decisions: 3 Race Rel. L. Rep. 724 (1958); 4 Race Rel. L. Rep. 143 (1958); 5 Race Rel. L. Rep. 814 (1960).

Denied Certiorari:

Navajo Tribe v. NLRB (Prior decision 288 F.2d 162, 6 Race Rel. L. Rep. 494, *infra* [D.C. Cir. 1961]). No. 872, May 22, 1961, 81 S.Ct. 1649.

Seals v. State of Alabama (Prior decision 126 So.2d 474, 6 Race Rel. L. Rep. 268 [Ala. Supreme Court, 1961] holding that it is too late on appeal to initiate a challenge to the grand and petit juries on the basis of alleged systematic exclusion of Negroes). No. 1041 Misc., June 12, 1961, 81 S.Ct. 1909, order: "The petition for a writ of certiorari is denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court."

Denied Rehearing:

Braden v. United States (Prior decision 81 S.Ct. 584, 6 Race Rel. L. Rep. 53 [1961] affirming the conviction of an officer of organizations advocating racial integration for contempt of Congress for refusing to answer questions by the subcommittee of the House of Representatives on Un-American Activities about his connections with the Communist party and alleged Communist-front organization). No. 54, April 17, 1961, 81 S.Ct. 1024.

Hannah v. Home Insurance Co. (Prior decision 81 S.Ct. 751, 6 Race Rel. L. Rep. 56 [1961] denying certiorari upon an affirmance by the Fifth Circuit Court of Appeals of a federal district court's dismissal of a complaint under the federal civil rights statutes for failure to state a claim within the court's original jurisdiction upon determination that the complaint, in naming numerous persons connected with a state court suit wherein plaintiff had been unsuccessful, was an effort to relitigate controversy covered by the state decision). No. 505 Misc., June 12, 1961, 81 S.Ct. 1905.

Other Orders:

National Association for the Advancement of Colored People v. Harrison (Prior decision 202 Va. 142, 116 S.E.2d 55, 5 Race Rel. L. Rep. 1152 [Va. Supreme Court of Appeals, 1960] upholding the constitutionality of a Virginia statute prohibiting "running and capping" and affirming a decision that the NAACP and its counsel had violated it, but holding unconstitutional as a violation of free speech, due process, and equal protection guarantees a statute making it unlawful for one not directly interested in litigation to solicit monetary or other assistance for court or administrative agency proceedings in the state). No. 689, June 19, 1961, 81 S.Ct. 1915, order: "The motion to substitute Frederick T. Gray in the place of Albert S. Harrison, Jr., Henry D. Garnett in the place of William J. Carlton, and Alfred W. Whitehurst in the place of Linwood B. Tabb, Jr., as the parties respondent is granted."

Board of Public Instruction of Duval County, Florida v. Hon. Bryan Simpson, United States District Judge; Daly N. Braxton, et al. (Prior decision, Civil Action No. 4598-J, ____ F. Supp. ____ [S.D. Fla. 1961], holding that it was not necessary to impanel a three-judge court to determine the merits of a class action to enjoin the continued operation of a biracial school system). No. 1101 Misc., June 19, 1961, 81 S.Ct. 1944, order: "Motion for leave to file petition for writ of mandamus and/or prohibition denied."

Cases Docketed:

Avent v. North Carolina (Prior decision 118 S.E.2d 47, 6 Race Rel. L. Rep. 172 [N.C. Supreme Court 1961] affirming trespass convictions of Durham sit-in participants). No. 943, May 4, 1961, 29 L.W. 3336.

Fox v. North Carolina (Prior decision 118 S.E.2d 58, 6 Race Rel. L. Rep. 181 [N.C. Supreme Court 1961] affirming trespass convictions of Raleigh sit-in participants). No. 944, May 4, 1961, 29 L.W. 3336.

Gremillion v. United States (Prior decision 194 F.Supp. 182, 6 Race Rel. L. Rep. 413, *infra* [E. D.La. 1961]. No. 200, July 3, 1961, 30 L.W. 3026.

Turner v. City of Memphis (Prior decision ____ F.Supp. ____, 6 Race Rel. L. Rep. 233 [W.D. Tenn. 1961] staying an action in the district court to enjoin the segregated operation of the Memphis municipal airport's eating and restroom facilities, pending prosecution of a declaratory judgment suit in state courts for an interpretation of pertinent state statutes and city ordinances). No. 935, May 1, 1961, 29 L.W. 3336.

Williams v. North Carolina (Prior decision 117 S.E.2d 824, 6 Race Rel. L. Rep. 182 [N.C. Supreme Court 1961] affirming the trespass conviction of a Monroe sit-in participant). No. 915, April 20, 1961, 29 L.W. 3319.

COURTS

EDUCATION

Public Schools—Georgia

CITY OF ATLANTA, et al. v. HILLTOP APARTMENTS, Inc.

Supreme Court of Georgia, April 6, 1961, Rehearing Denied, April 20, 1961, 119 S.E.2d 576.

SUMMARY: In April, 1960, a corporation doing business in Atlanta, Georgia, filed an action in the Fulton County Superior Court against the city and its revenue collector, asking that defendants be enjoined from collecting school taxes assessed against plaintiff for the year 1959. Plaintiff contended that, by reason of certain federal court decisions, the city was disabled from collecting the contested taxes because a 1959 legislative act authorized cities having an independent school system to levy and collect taxes only for the support of racially-separate public schools, and provided that if any court of competent jurisdiction shall hold that the support of such separate schools is illegal or unconstitutional or finally determine that a city cannot maintain such separate schools, no such city shall thereafter have authority to levy school taxes. The court held that the 1959 act set forth the exclusive method for levying and collecting 1959 taxes, and that a 1960 amendatory act [5 Race Rel. L. Rep. 520 (1960)], which would permit the levy and collection of taxes until there be actual integration of the races in a city school system, did not apply to the 1959 school tax. It was also held that the federal district court's orders and judgments constitute a final determination by a court of competent jurisdiction such as disabled the city in reference to the 1959 school tax in question. The petition was therefore held to set out a cause of action for the relief prayed. 6 Race Rel. L. Rep. 67 (1960).

Defendants brought error, and the state supreme court reversed the judgment, holding that the petition alleged no cause of action and that it was error to overrule defendants' demurrer. The court pointed out that the 1959 act provided that, upon a decision by a court of competent jurisdiction that a city cannot maintain racially separate schools, "then all power conferred upon any such municipal corporation by this act shall immediately terminate and no such municipal corporation shall thereafter have power or authority to levy any tax . . . for the support and maintenance of public schools." (Italics added by the court.) It was further pointed out that the municipal school taxes for the year 1959 were levied under prior law, and that the 1959 act did not attempt to terminate any tax levy made under prior law to take away power to collect taxes not levied under the 1959 act. The repealing clause of the 1959 act was held not to have the effect of nullifying tax levies made under the repealed law.

DUCKWORTH, Chief Justice.

Syllabus by the Court

The provision of Georgia Laws 1959, p. 157, for termination, upon the happening of the events therein recited, of all powers thereby conferred had no reference to actions taken under prior law, and hence school taxes for 1959, having been levied before the approval on March 10, 1959, of the above act are not cov-

ered by that act, and the power to collect same exists despite the happening of the event which resulted in termination of all powers conferred by the 1959 act.

• • •

At its 1959 session, the General Assembly of Georgia passed an act (Ga.L.1959, p. 157) relating to taxation by municipal corporations to support independent school systems, by authorizing ad valorem taxation for the support of such school systems, and to limit the purposes for

which the power of taxation may be exercised in the support of such school systems, which power was conferred only for the purpose of levying such taxes for the support of separate public schools for the white and colored races, and if any court of competent jurisdiction shall hold that such support is illegal or violative of the constitutional right of any person, or if any such court determine that any such municipal corporation cannot maintain such separate schools, "then all power conferred upon any such municipality by this Act shall immediately terminate and cease to be effective and no such municipal corporation shall thereafter have power and authority to levy any tax ad valorem or otherwise, for the support and maintenance of public schools." The act also gave the superior court of any county where any attempt to exercise the power thus terminated the jurisdiction to enjoin such attempt "at the suit of any taxpayer of the municipality."

The defendant in error in a petition, in the lower court, alleges that, as a taxpayer of the municipality of the City of Atlanta, an order having been issued by the United States District Court of the Northern District of Georgia in a certain case in that court—as more fully set out in the petition—which enjoins the segregation of the races in the Atlanta schools, and such order is such as is contemplated by the above act, it is entitled to an injunction enjoining the municipality and its taxing authorities from making any levy upon petitioner's property, from advertising it for sale to satisfy a tax *fi. fa.*, which has been issued against the petitioner for school taxes for the year 1959.

Demurrers were filed to this petition, which was amended and renewed demurrers filed thereto, and after a hearing, the same were overruled. The exception to this judgment is by the City of Atlanta and its municipal revenue collector as plaintiffs in error, naming the petitioner as the defendant in error.

* * *

DUCKWORTH, Chief Justice.

In the view we take of this case, it is unnecessary to decide whether or not the court orders upon which the case is in part based, are such as contemplated by the 1959 act (Ga.L.1959, p. 157) under which this action is brought. The petition alleges that, because of court orders, there has been activated that portion of the 1959 act, found in section two, which

reads as follows: "then all power conferred upon any such municipal corporation *by this Act* shall immediately terminate and cease to be effective and no such municipal corporation shall thereafter have power or authority to levy any tax ad valorem or otherwise, for the support and maintenance of public schools." It is conceded by counsel, and we think we would be required to take judicial cognizance of the fact, that municipal school taxes for the year 1959, which is the only year here involved, were levied under prior law before the 1959 act was approved on March 10, 1959. The plain provisions of the 1959 act relates to what may be done under that act concerning levying school taxes, collecting taxes thus levied, and upon the happening of specified events this power—the power conferred by the 1959 act—shall cease. There is no attempt in the act to terminate any tax levy made under prior law or take away power to collect taxes not levied under the 1959 act. The repealing clause of the act did not have the effect of nullifying tax levies made under the repealed law. Chaos would follow from such a result. The school authorities were charged with the high responsibility of operating the schools, which required them to act under existing law, and in the absence of expressed legislative intent so to do we will not construe their acts to mean or intend such dire consequences to those who acted in good faith under the law as it existed.

If it be contended that the repealing clause of the 1959 act eliminated authority to collect these taxes which were levied under prior law, we think there are two complete replies thereto, to wit: (1) the same law that authorized the levy also authorized the collection, and any repeal would not take away that power; and (2) the 1960 amendment (Ga.L.1960, p. 147) provides that notwithstanding anything to the contrary in the 1959 act as amended, such municipal corporations "shall have power to and may levy and collect any tax, the lien of which attached prior to" the admission of colored children to white schools. Nor are we concerned with an act of 1961 (Ga.L.1961, pp. 35, 38) which repeals the amended 1959 act. As pointed out above, the levying of the tax under a valid law is enough to authorize its collection.

For the foregoing reasons, the petition alleges no cause of action, and it was error to overrule the general demurrer thereto.

Judgment reversed.

All the Justices concur.

EDUCATION Public Schools—Louisiana

Earl Benjamin BUSH v. ORLEANS PARISH SCHOOL BOARD, et al.

United States District Court, Eastern District, Louisiana, New Orleans Division, May 4, 1961, Civ. A. 3630, 194 F.Supp. 182.

SUMMARY: This is a continuing development in the efforts of Negroes to desegregate schools in Orleans Parish, Louisiana. Earlier litigation may be found at 1 Race Rel. L. Rep. 304, 306, 643 (1956); 2 Race Rel. L. Rep. 308, 778 (1958); 3 Race Rel. L. Rep. 171, 424, 649 (1958); 4 Race Rel. L. Rep. 581 (1959); 5 Race Rel. L. Rep. 375, 378, 655, 1000, 1020 (1960); 6 Race Rel. L. Rep. 74 (1961).

In February, 1961, a three-judge federal court enjoined the enforcement of certain Acts of the second and third extraordinary session of the 1960 Louisiana legislature, after finding that the Acts were designed to thwart desegregation of Orleans Parish schools.

In May, 1961, the United States attorney, as *amicus curiae*, moved to enjoin the enforcement of two more Acts—3 and 5 of the second extraordinary 1961 session (6 Race Rel. L. Rep. 304, 313). Act 3 provides punishment for the giving to, or accepting by, parents of anything of value as an inducement to sending a child to schools operated "in violation of any law of this State." Act 5 condemns "the offering to do or doing of any act . . ." to a child, parent or school employee which may influence that person to violate state law. The court observed that, while courts of equity do not ordinarily restrain criminal prosecutions, the Acts in question are not ordinary criminal statutes. Rather, they were held to be "emergency" measures designed solely to stop the program of limited desegregation in Orleans Parish schools by threatening imprisonment to all persons having any dealings with an integrated school. This effect on the parents being immediate, the court held that it should intervene by injunction, rather than leave the validity of the statute to be determined in a criminal proceeding in a state court.

Before RIVES, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges.

At its last session, officially labeled the Second Extraordinary Session of 1961, and actually the fifth consecutive sitting since November, the Legislature of Louisiana passed, and her Governor approved, two additional measures designed to subvert the effective desegregation of the New Orleans schools and thwart the implementation of the orders of this court looking to that end.¹ The statutes in question are Acts 3 and 5, the enforcement of which the United States now asks to enjoin.²

The legislation takes the form of amendments to the Louisiana Criminal Code. Act 3 purports to create a new crime entitled "Bribery of parents of school children." It punishes giving to,

or acceptance by, any parent of "anything of apparent present or prospective value" as an "inducement" to sending his child to a school operated "in violation of any law of this State."³

3. The full text of Act 3, as it is proposed to be inserted in the Criminal Code, is as follows:

"§ 119.1. Bribery of parents of school children. Bribery of parents of school children is the giving or offering to give, directly or indirectly, any money, or anything of apparent present or prospective value to any parent, to any tutor or guardian, to any person having legal or actual custody of, or to any person standing in loco parentis to, any child eligible to attend a public school in this State, as an inducement to encourage, influence, prompt, reward or compensate any such person to permit, prompt, force, or cause any such child to attend any such school in violation of any law of this State.

The acceptance of, or the offer to accept, directly or indirectly, any money, or anything of apparent present or prospective value, by any such person under any such circumstances, shall also constitute bribery of parents of school children. Whoever commits the crime of bribery of parents of school children shall be fined not less than five hundred dollars, nor more than one thousand dollars, and imprisoned for not more than one year.

In the trial of persons charged with bribery of

1. For the prior history of this litigation, see *Bush v. Orleans Parish School Board*, E.D. La., 138 F. Supp. 337, affirmed, 242 F.2d 156; id., 163 F.Supp. 701, affirmed, 268 F.2d 78; id., 187 F.Supp. 42, affirmed, 365 U.S. 569; id., 188 F.Supp. 916, affirmed, 365 U.S. 569; id., 190 F.Supp. 861; id., F.Supp. (3/3/61). A complete outline of earlier developments is given in Note 1 of the last cited opinion.

2. The United States appears as *amicus curiae*. See *Bush v. Orleans Parish School Board*, E.D. La., F.Supp. (3/3/61).

The companion crime announced by Act 5 is labeled "Intimidation and interference in the operation of schools." Here, in rather strange language, the conduct condemned is "the offering to do or doing of any act . . . to" a child or parent, teacher or other school employee, which may influence that person "to do or perform any act in violation of any law of this state."⁴ Both statutes grant immunity from prosecution and promise a monetary reward to informers.

With commendable frankness, Louisiana's Attorney General admits that these enactments are probably invalid, being too vague and indefinite to define a crime.⁵ But he insists that this is neither the time nor the place to challenge them. He would prefer the test to come in a state

parents of school children, either the bribe-giver or the bribe-taker may give evidence, or make affidavit against the other, with immunity from prosecution in favor of the first informer, except for perjury in giving such testimony.

Any fine imposed and collected from the convicted person or persons under the provisions of this Section shall be paid to the informer or informers who shall give information resulting in the conviction of said person or persons. No penalty imposed under the provisions of this Section shall be suspended or remitted by any court."

4. Act 5, in pertinent part, reads:

"Section 122.1. Intimidation and interference in the operation of schools.

Intimidation and interference in the operation of public schools is the offering to do or doing of any act, or threatening to do any act, directly or indirectly, to any child enrolled in a public school, to any parent, tutor or guardian, or person having lawful custody of or standing in loco parentis to any such child, the purpose and intent of which is to intimidate, induce, influence, reward, compensate or cause any such person, or any school teacher, school principal, transfer operator, or any other school employee, to do or perform any act in violation of any law of this state.

Whoever commits the crime of intimidation and interference in the operation of schools shall be fined not less than five hundred dollars, nor more than one thousand dollars, and imprisoned for not more than one year.

In the trial of persons charged with public intimidation and interference in the operation of schools, either the person doing or offering to do or the person or persons sought to be influenced, coerced, intimidated, threatened, or forced, may give evidence, or make affidavit against the other, with immunity from prosecution in favor of the first informer, except for perjury in giving such testimony.

Any fine imposed and collected from the convicted person or persons under the provisions of this Section shall be paid to the informer or informers who shall give information resulting in the conviction of said person or persons. No penalty imposed under the provisions of this Section shall be suspended or remitted by any court."

5. The principle is well established in Louisiana that a criminal enactment which is so vague and in-

court after an accused has been arrested, held and charged under authority of the statutes here assailed. Such a person, he argues, would have a better standing to contest the constitutionality of these measures, and, since a ruling striking them down can confidently be predicted from the Louisiana courts, we are urged to spare ourselves this unnecessary chore.

True, "it is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions."⁶ *Douglas v. Jeannette*, 319 U.S. 157, 163. And this principle has special force when application is made to a federal court to enjoin the enforcement of state criminal statutes, for then considerations of comity add their weight to suggest abstention. *Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 49-50. See also, *Harrison v. N.A.A.C.P.*, 360 U.S. 167. But the rule cannot be applied mechanically. *N.A.A.C.P. v. Bennett*, 360 U.S. 471; cf. *Doud v. Hodge*, 350 U.S. 485. Special circumstances will sometimes compel a federal court to act. *Truax v. Raich*, 239 U.S. 33; *Pierce v. Society of Sisters*, 268 U.S. 510; *Hague v. C.I.O.*, 307 U.S. 496; see *Terrace v. Thompson*, 263 U.S. 197, 214; *Packard v. Banton*, 264 U.S. 140, 143; *Spielman Motor Co. v. Dodge*, 295 U.S. 89, 95; *Beal v. Missouri Pacific R. Co.*, supra, 50; *Douglas v. Jeannette*, supra, 163; *Denton v. City of Carrollton, Georgia*, 5 Cir., 235 F.2d 481, 484-485. This is such a case.

The challenged statutes are not ordinary criminal provisions. They constitute special legislation, passed as "emergency"⁷ measures to ac-

definite as to fail properly to inform the public of the conduct sought to be prohibited is null as violative of the Louisiana Constitution of 1921, Article 1, Section 10. See *City of Shreveport v. Moran*, 174 La. 271, 140 So. 475; *State v. Truby*, 211 La. 178, 29 So.2d 758; *State v. Vallery*, 212 La. 1095, 34 So.2d 329; *State v. Kraft*, 214 La. 351, 37 So.2d 815; *City of Shreveport v. Brewer*, 225 La. 93, 72 So.2d 308; *State v. Murtes*, 232 La. 486, 94 So.2d 446; *State v. Christine*, 239 La. 259, 118 So.2d 403 (on rehearing). See also, *State v. Gaster*, 45 La. Ann. 636, 12 So. 739 (decided under similar provisions in the Louisiana Constitution of 1879); *State v. Comeaux*, 131 La. 930, 60 So. 620 (Constitution of 1898); *City of Shreveport v. Wilson*, 145 La. 906, 83 So. 186 (Constitution of 1913). The Federal Constitution likewise guarantees against vagueness in the state criminal laws. See *Winters v. New York*, 333 U.S. 507.

6. Of course, since no prosecution is now pending in the state courts, the prohibition of 28 U.S.C. §2283 does not apply. Nor does the rule that federal courts will not intervene to assure respect for procedural due process in the conduct of a state criminal trial.

7. Acts 3 and 5 were both certified by the Governor as "emergency legislation" under Art. 3, §27, of the Louisiana Constitution. The effect of this certi-

compish a specific purpose. Placed in context, their mission is all too clear. These are the invidious weapons of a state administration dedicated to scuttling the modest program of desegregation which has been initiated in Orleans Parish. The plain intent of the measures is to publish a threat of imprisonment against all who would have any dealings with an integrated school. Whether or not prosecution is ever attempted under these provisions, the obvious hope of the sponsors is that the mere promulgation of the statutes will accomplish the desired end. Thus, the effect is immediate. The harm has already begun. In these circumstances, there can be no question of postponing decision.

Nor can there be any doubt as to the unconstitutionality of these acts. They are revealed as but another effort to circumvent the orders of the court issued pursuant to the mandate of *Brown v. Board of Education*, 347 U.S. 483.⁸ Constitutionally unable to require racial segregation in the public schools, arrested in its plan to close the integrated schools, and unsuccessful in its boycott of these schools by other means, the State has now marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club.

It is argued, however, that we read too much in the statutes. We are told that these laws have no connection with segregation; that the reference to schools operated "in violation of any law of this State" does not mean desegregated schools. It cannot be, so the argument goes, because this court has voided all laws requiring or permitting segregation of the races in public education.

Of course, the circumstances under which these measures were adopted belie any such claim of innocence. The Legislature clearly wants parents and teachers, and other interested persons, to understand that they will be punished if they have any contact with an integrated school. Yet, it would play tricks with the court and pretend it had meant nothing of the kind. "But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action." *Graham v. Folsom*, 200 U.S. 248, 253. Moreover, in this instance, the Legislature has explained its meaning for all to

hear. We need not probe the public mind to learn what was intended by "the law of the State." We have but to listen to its official voice to learn that "the law of the State" is Louisiana legislatese for segregation.

Thus, in the acts of the First Extraordinary Session of 1960 providing for the closure or boycott of desegregated schools, the euphemism "operated contrary to the Constitution and laws of this State" was used to describe the offending facilities.⁹ There was no doubt then what was intended, and there can be less now after the constant reiteration of that chant. It is true these statutes were voided on November 30, 1960,¹⁰ but the Legislature did not acquiesce in this ruling. On the contrary, shortly after the decision, it solemnly proclaimed that: "the public policy of the State of Louisiana, as expressed and declared in Act No. 2 of the First Extraordinary Session of 1960, and in all other Acts and Resolutions declaring, establishing and implementing the public policy of this State in respect to interposition and segregation of the races in the public school system, be and said public policy is hereby REAFFIRMED and again declared to be the public policy of the State of Louisiana." H. Conc. Res. 26, 2d Ex. Sess. 1960. Accordingly, we must assume that "laws of the State" means here what it meant there.

Nor is this all. Twice during the Second Extraordinary Session of 1960 the Legislature commended parents who had withdrawn their children from the two desegregated schools of New Orleans, specifically declaring that they were thereby demonstrating "their will to support the constitution and laws of this state." H. Conc. Res. 1 and S. Conc. Res. 1, 2d Ex. Sess. 1960. Similarly, in a later resolution defending its own officers cited for contempt for refusing to authorize payment of teachers at these two schools, it asserted such payments "would have been in violation of the Constitution and laws of the State of Louisiana." H. Conc. Res. 8, 3d Ex. Sess. 1960. And, finally, during the very session at which the statutes in suit were passed, the Legislature formally proclaimed its view that the two desegregated schools of New Orleans were "operating in violation of the provisions and principles of the State Constitution

fiction is to dispense with the normal delays and make the measure effective immediately upon the Governor's approval.

8. See *Bush v. Orleans Parish School Board*, E.D. La., 188 F.Supp. 916; *id.*, F.Supp. (3/3/61).

9. For a catalog of these statutes, see *Bush v. Orleans Parish School Board*, E.D. La., 188 F.Supp. 916, 936, Appendix B.

10. *Bush v. Orleans Parish School Board*, E.D. La., 188 F.Supp. 916, affirmed, 365 U.S. 569.

and laws * * *." H. Conc. Res. 22, 2d Ex. Sess. 1961.

The subterfuge will not avail. Unmasked for what they are, Acts 3 and 5 are unconstitutional on their face and must be enjoined.

TEMPORARY INJUNCTION

This case came on for hearing on motions of the United States, *amicus curiae*, for temporary injunction, restraining the enforcement of Acts 3 and 5 of the Second Extraordinary Session of the Louisiana Legislature for 1961.

It being the opinion of this court that all Louisiana statutes which would directly or indirectly require segregation of the races in the public schools, or interfere with the operation of such schools, pursuant to the orders of this court, by the duly elected Orleans Parish School Board, are unconstitutional, in particular, the aforesaid Acts 3 and 5;

IT IS ORDERED that the Honorable Jimmie H. Davis, Governor of Louisiana, the Honorable Jack P. F. Gremillion, Attorney General of the State of Louisiana, Murphy J. Roden, Director

of Public Safety of Louisiana, Richard A. Dowling, District Attorney of Orleans Parish, Louis A. Heyd, Jr., Criminal Sheriff of Orleans Parish, deLesseps S. Morrison, Mayor of the City of New Orleans, Joseph I. Giarrusso, Superintendent of Police of the City of New Orleans, their successors, agents, and representatives, and all other persons who are acting or may act in concert with them, be, and they are hereby, restrained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Acts 3 and 5 of the Second Extraordinary Session of the Louisiana Legislature for 1961, and from otherwise interfering in any way with the operation of the public schools for the Parish of Orleans by the duly elected Orleans Parish School Board, pursuant to the orders of this court.

IT IS FURTHER ORDERED that copies of this temporary injunction shall be served forthwith upon each of the defendants named herein.

Inasmuch as this temporary injunction is issued on the motions of the United States, no bond is required. 28 U.S.C. § 2408.

EDUCATION

Public Schools—Louisiana

Lawrence HALL, et al. v. ST. HELENA PARISH SCHOOL BOARD, et al.

United States District Court, Eastern District, Louisiana, Baton Rouge Division, April 24, 1961, Civil Action No. 1068, _____ F.Supp._____.

SUMMARY: Negro children in St. Helena Parish, Louisiana, filed suit in 1951 seeking desegregation of parish schools. In 1960, a federal district court entered a judgment enjoining the defendant school officials from requiring racial segregation "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." 5 Race Rel. L. Rep. 654 (1960).

After affirmance of the decision by the Court of Appeals for the Fifth Circuit [6 Race Rel. L. Rep. 83 (1961)], action was started in the parish to close the public schools, subject to a referendum, as provided by Act 2 of the second extraordinary session of the 1961 Louisiana legislature (6 Race Rel. L. Rep. 310). Plaintiffs moved the federal district court to enjoin the enforcement of the Act. The court refused to grant the injunction, but the parish officials agreed not to proceed further under the Act pending litigation of its constitutionality. Before giving further consideration to the matter of the validity of the Act, the court invited counsel for the parties in this case, the Attorney General of the United States, and the attorneys general of the several states to submit briefs on the question of whether today's concept

of due process obliges the state to provide public education, even though the state's constitution does not require it. The court called attention to a Louisiana statute providing grants-in-aid if public schools are closed. (Act 258 of 1958, 3 Race Rel. L. Rep. 1062).

Before WISDOM, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges.

This cause came on for hearing this day on Application of Plaintiffs, Lawrence Hall, et al, for preliminary injunction restraining enforcement of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961, and motions of Defendants to dismiss.

Argument on motions.

Joint Stipulation of Act 2 into evidence (In record)

The following witnesses were called and testified on behalf of the Plaintiff:

Carl Stone, on cross-examination, sworn by deputy clerk James L. Meadows, on cross-examination, sworn by deputy Clk.

Plaintiff rests.

Defendant rests.

Argument.

IT IS ORDERED that the motions of Defendants to dismiss be, and the same are hereby, OVERRULED.

(See Per Curiam)

St. Helena School Board through Counsel agreed not to proceed under Act 2, pending decision in this case.

SUBMITTED on application of Plaintiffs, etc., for Preliminary Injunction, restraining enforcement of Act 2 of the 2nd Extraordinary Session of the La. Leg. for 1961.

Briefs to be submitted by May 5th, 1961.

PER CURIAM:

The motions are overruled, in part because counsel for the plaintiffs has made it clear that the plaintiffs do not seek to enjoin the holding of the election fixed for April 22, 1961, in the Parish of St. Helena. The election has bearing in this case only as the initial step, under Act No. 2 of the Second Extraordinary Session of 1961, leading to the closing of public schools in St. Helena.

If Act 2 is unconstitutional, the defendants properly before the Court may be enjoined from carrying out the provisions of the law.

We have an open mind on the constitutionality of the statute. We point out, however, that national policy and state policy require us to

scrutinize carefully any statute leading to the closing of public schools. When there is now such a manifest correlation between education and national survival, it is a sad and ill-timed hour to shut the doors to public schools. And, now, when one of the principal functions of the state is to maintain an educational system, it seems strange indeed and anti-civilized to shift the major financial burden to private persons, many of whom can not afford or can ill-afford to pay for private schooling, even with the benefit of a grant-in-aid. We think that this case raises due process questions that have not been briefed.

Does Act 2 violate the due process clause of the Fourteenth Amendment by depriving children of the opportunity to obtain a public school education? We divide this question into two sub-questions. (1) Is it implicit in today's concept of due process that a child has a right to a public school education, even though there is no provision in the state constitution requiring the state to maintain a public school system? (2) In the fact situation this case presents, considering especially that the state now maintains and has for many years maintained a public school system, does Act 2 violate due process if its effect is to deprive the children in St. Helena Parish of a public school education?

We raise a further question. Is a statute constitutional that, in effect, offers children (1) education on an unconstitutional condition, that is, attendance at a segregated school, or (2) no education at all?

The Court is cognizant of Act 258 of 1958 which provides for a grant-in-aid program. But is grant-in-aid and adequate constitutional substitute for public school education, particularly where such grant-in-aid will, in all probability, result in segregated private schools? The Court suggests that consideration be given to this question in the briefs to be filed.

The Court invites counsel for all parties to file briefs by Friday, May 5, 1961. The Court also invites the United States to file a brief as amicus curiae presenting the views of the United States.

Because of the time required for the filing of

the briefs and the determination of the case, it is suggested that, irrespective of the results of the election, the Board agrees not to proceed under Act 2 pending our decision in this case.

ORDER

This case came on for hearing on plaintiffs' motion for temporary injunction restraining enforcement of Act 2 of the Second Extraordinary Session of 1961 of the Louisiana Legislature. The court, finding that the motion raises serious constitutional questions, invited counsel for all parties to brief the questions presented. The United States was also invited to file a brief *amicus*. It appearing that questions presented by the motion may be of serious concern to the States of the United States;

IT IS ORDERED that the Attorneys General

of the several states of the United States be, and they are hereby, invited by the court to file an *amicus* brief herein by June 5, 1961, covering the following questions:

1. Would the abandonment by a state of its public school system deprive children of rights guaranteed by the Due Process or Equal Protection Clauses of the Fourteenth Amendment?
2. Would the answer be the same if the abandonment were on a local option basis after a vote of the electorate authorizing county school authorities to close the public schools?

IT IS FURTHER ORDERED that the Clerk of this Court mail certified copies of this order to the Attorney General of each State of the Union.

EDUCATION

Public Schools—New York

Leslie TAYLOR, etc., et al. v. THE BOARD OF EDUCATION of the CITY SCHOOL DISTRICT of THE CITY OF NEW ROCHELLE, etc., et al.

United States Court of Appeals, Second Circuit, April 13, 1961, 288 F.2d 600.

SUMMARY: New Rochelle, New York, Negro children brought a class action in federal district court against the city board of education and superintendent of schools, contending that the board had created and maintained a racially-segregated elementary school in violation of their Fourteenth Amendment rights. The court found that the board, having created a segregated school, was under a constitutionally imposed duty to end segregation in good faith with all deliberate speed, which obligation clearly had not been fulfilled. The board was therefore ordered to present by April 14, 1961, a desegregation plan to begin no later than the start of the 1961-62 school year. On March 7, 1961, the court refused to suspend or stay the order requiring that a plan be submitted by April 14, and denied as premature a motion to permit plaintiffs immediately to enroll in schools other than the predominantly Negro schools. 6 Race Rel. L. Rep. 90 (1961). Therefore, defendants moved the Court of Appeals for the Second Circuit for a stay of the direction to file a plan, pending the appeal. The court extended the board's time to file the plan pending a decision by the court as to whether it had jurisdiction at this stage to hear an appeal, and in any event to May 3, 1961. On April 13, the court announced its conclusion that "we have no power to entertain the Board's appeal until the District Court has finished its work by directing the Board to take or refrain from action." The court relied upon the "salutary Federal rule requiring finality as a condition of appealability"; and finding that the instant appeal comes within none of the recognized exceptions to the rule, dismissed it "for want of jurisdiction at this time." One judge dissented.

Before MOORE, FRIENDLY and SMITH, Circuit Judges.

FRIENDLY, Circuit Judge.

In this action, eleven Negro children, proceeding through their parents, seek declaratory and injunctive relief against the Board of Education of New Rochelle, New York, and the Superintendent of Schools. On January 24, 1961, Judge Kaufman signed an opinion, 191 F.Supp. 181, stated to constitute the District Court's findings of fact and conclusions of law, which held that various acts of the defendants violated plaintiffs' constitutional rights as defined in *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and later decisions of the Supreme Court. The opinion ended with two paragraphs, quoted in the margin,¹ in which the District Judge stated, among other things, that he deemed it "unnecessary at this time to determine the extent to which each of the items of the relief requested by plaintiffs will be afforded," [191 F.Supp. 198] but would defer such determination until the Board had presented, on or before April 14, 1961, "a plan for desegregation in accordance with this Opinion, said desegregation to begin no later than the start of the 1961-62 school year."

Pursuant to authorization by a 5-3 vote at a meeting of the Board February 7, 1961, defendants appealed to this Court on February 20, 1961. On March 7, 1961, the District Judge denied an application by them to extend the date for filing a plan pending determination of the appeal, as well as a motion by plaintiffs for an order directing defendants immediately to assign plaintiffs to elementary schools other than

the Lincoln School. Thereupon, defendants moved this Court for a stay of the direction to file a plan, pending the appeal. At the hearing on that motion, the Court questioned whether the appeal had not been prematurely taken and was not, therefore, beyond the appellate jurisdiction conferred upon the Court by Congress. Later we directed the filing of briefs on this issue and extended the Board's time to file the plan pending the Court's decision on the question of jurisdiction and in any event to May 3, 1961. Appellees now challenge our power to hear an appeal at this stage, but the question is one this Court was obliged to raise in any event, *Mitchell v. Maurer*, 1934, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L. Ed. 338, and it is better that this be determined now rather than after further time has elapsed. Upon full consideration, we conclude that we have no power to entertain the Board's appeal until the District Court has finished its work by directing the Board to take or refrain from action.

Familiar decisions of the Supreme Court establish the controlling principles. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick v. United States*, 1940, 309 U.S. 323, 324-325, 60 S.Ct. 540, 541, 84 L.Ed. 783. "The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments * * *'" *Luxton v. North River Bridge Co.*, 147 U.S. 337, 341 [13 S.Ct. 356, 358, 37 L.Ed. 194]. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals." *Catlin v. United States*, 1945, 324 U.S. 229, 233-234, 65 S.Ct. 631, 634, 89 L.Ed. 911.

A "final decision" within 28 U.S.C. § 1291, the basic statute authorizing appeals to the courts of appeals, and its predecessors going back to §§ 21 and 22 of the Act of Sept. 24, 1789, c. 20, 1 Stat. 73, 83-84, "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, supra, 324 U.S. at page 233, 65 S.Ct. at page 633. Plainly Judge Kaufman's decision of January 24, 1961 does not fit that description. It constituted only a determination that plaintiffs were entitled to relief, the nature and extent of which would be the

1.

"The Decree

"In determining the manner in which the Negro children residing within the Lincoln district are to be afforded the opportunities guaranteed by the Constitution, I will follow the procedure authorized by the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083] (1955), and utilized by many district courts in implementing the *Brown* principles. Thus, I deem it unnecessary at this time to determine the extent to which each of the items of relief requested by plaintiffs will be afforded. Instead, the Board is hereby ordered to present to this Court, on or before April 14, 1961, a plan for desegregation in accordance with this Opinion, said desegregation to begin no later than the start of the 1961-62 school year. This court will retain jurisdiction of this action until such plan has been presented, approved by the court, and then implemented.

"The foregoing Opinion will constitute the court's findings of fact and conclusions of law."

subject of subsequent judicial consideration by him. What remained to be done was far more than those ministerial duties the pendency of which is not fatal to finality and consequent appealability, *Ray v. Law*, 1805, 3 Cranch 179, 180, 2 L.Ed. 404. An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own, *The Palmyra*, 1825, 10 Wheat. 502, 6 L.Ed. 375; *Barnard v. Gibson*, 1849, 7 How. 650, 12 L.Ed. 857; *Leonidakis v. International Telecoinc Corp.*, 2 Cir., 1953, 208 F.2d 934; 6 Moore, *Federal Practice* (1953 ed.), p. 125 and fn. 5, although in all such cases, as here, this subjects the defendant to further proceedings in the court of first instance that will have been uncalled for if that court's determination of liability is ultimately found to be wrong. Recognizing that this may create hardship, Congress has removed two types of cases from the general rule that appeals may not be taken from decisions that establish liability without decreeing a remedy—namely, decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed," 28 U.S.C. § 1292(a) (3), added by the Act of April 3, 1926, c. 102, 44 Stat. 233, and "judgments in civil actions for patent infringement which are final except for accounting"; 28 U.S.C. § 1292(a) (4), added by the Act of Feb. 28, 1927, c. 228, 44 Stat. 1261. Congress' specification of these exceptions, manifestly inapplicable here, underscores the general rule.

This salutary Federal rule requiring finality as a condition of appealability has become subject, over the years, to exceptions other than those just mentioned, some fashioned by the courts and others enacted by Congress. The instant appeal does not come within any.

Of the judicially created exceptions, the one referred to in *Dickinson v. Petroleum Conversion Corporation*, 1950, 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299, namely, that under some circumstances a decree may be final as to one party although the litigation proceeds as to others, is so manifestly inapplicable that we would not mention it if appellants had not. Similarly inapplicable is the rule in *Forgay v. Conrad*, 1848, 6 How. 201, 12 L.Ed. 404, that a judgment directing a defendant to make immediate delivery of property to a plaintiff is appealable despite a further provision for an accounting. The scope

of this doctrine is narrow and rests upon "the potential factor of irreparable injury," 6 Moore, *Federal Practice* (1953 ed.), p. 129—just how narrow is shown by decisions refusing to apply it to a decree that adjudged rights in property but made no disposition of the property pending a further hearing relating to its precise identification, *Rexford v. Brunswick-Balke-Collender Co.*, 1913, 228 U.S. 339, 33 S.Ct. 515, 57 L.Ed. 864, or to a decree awarding possession to the United States under eminent domain but reserving the question of compensation, *Catlin v. United States*, supra, 324 U.S. at page 232, 65 S.Ct. at page 633, overruling our contrary decision in *United States v. 243.22 Acres of Land*, 2 Cir., 1942, 129 F.2d 678. See *Republic Natural Gas Co. v. State of Oklahoma*, 1948, 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed. 1212. Here, while we understand defendants' dislike of presenting a plan of desegregation and attending hearings thereon that would be unnecessary if the finding of liability were ultimately to be annulled, and also the possibly unwarranted expectations this course may create, this is scarcely injury at all in the legal sense and surely not an irreparable one. Equally inapposite is the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 545-547, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528, also advanced by appellants, permitting review of orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Here the issue sought to be reviewed, far from being collateral to the main litigation, represents the very findings and conclusions upon which any final judgment against the defendants must rest.

Turning to statutory exceptions, the only one that could be, and is, claimed to be applicable is 28 U.S.C. § 1292(a) (1). That gives us jurisdiction over "Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." The term "injunction" includes not only an order prohibiting certain conduct during the pendency of litigation but also one that commands it. *Societe Internationale, etc. v. McGrath*, 1950, 86 U.S. App.D.C. 157, 180 F.2d 406.

Appellants contend Judge Kaufman's decision

granted both a prohibitory and a mandatory injunction. They say the order "in effect" prohibited them from proceeding with their plans to reconstruct the Lincoln School and commanded them to submit a plan. If the former were so, the order would clearly be appealable; we have searched the opinion for substantiation but in vain. To be sure, the opinion says the proposed reconstruction alone might aggravate the problem rather than ameliorate it; and we fully appreciate why the Board may hesitate to proceed in the light of this, as, indeed, it might have if the opinion had not yet been rendered. But as yet we can only conjecture whether the District Court will enjoin the rebuilding or permit this if accompanied by other acts; and a defendant's apprehension that conduct on his part may ultimately be restrained is not an "injunction" within § 1292(a) (1).

Whether Judge Kaufman's direction for the submission of a plan on April 14 is a mandatory injunction requires, in the first instance, interpretation of what was said. It is common practice for an equity judge first to reach a conclusion as to liability and to determine the appropriate relief later in the event of an affirmative finding. If the District Judge had said in his opinion only that a further hearing would be held at which the parties would have an opportunity to express themselves as to relief, by testimony, argument, or both, it would be entirely plain that he had not granted a mandatory injunction, and this would be so even if he had also stated that, in the interest of orderly procedure, he would expect the defendants to take the lead at the hearing. In substance this is what Judge Kaufman did. Although the penultimate paragraph of his opinion is headed "The Decree," the context makes clear that the few sentences that follow were not, themselves, decretal, but simply explained how he planned to fashion his decree. To be sure, the opinion used the word "ordered" with respect to the filing of a plan, just as courts often "order" or "direct" parties to file briefs, findings and other papers. Normally this does not mean that the court will hold in contempt a party that does not do this, but rather that if he fails to file by the date specified, the court may refuse to receive his submission later and may proceed without it. That this was what Judge Kaufman intended is confirmed by his later opinion denying an extension of the April 14 date, in which he spoke of having "specifically requested

the Board to submit its plan for desegregation of the Lincoln School" and of having given the Board "an opportunity to submit" such a plan. Moreover, even if the order was intended to carry contempt sanctions, which we do not believe, a command that relates merely to the taking of a step in a judicial proceeding is not generally regarded as a mandatory injunction, even when its effect on the outcome is far greater than here, 6 Moore, Federal Practice (1953 ed.) pp. 46-47.² For just as not every order containing words of restraint is a negative injunction within 28 U.S.C. § 1292(a) (1), Baltimore Contractors, Inc. v. Bodinger, 1955, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233; Fleischer v. Phillips, 2 Cir., 1959, 264 F.2d 515, 516, certiorari denied 1959, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030; Grant v. United States, 2 Cir., 1960, 282 F.2d 165, 170, so not every order containing words of command is a mandatory injunction within that section.

Our review of the cases that have reached appellate courts in the wake of *Brown v. Board of Education*, supra, and its supplement, 1955, 349 U.S. 294, 75 S.Ct. 753, has revealed only one in which jurisdiction may have been taken under such circumstances as here. In *Clemons v. Board of Education of Hillsboro*, 6 Cir., 1956, 228 F.2d 853; *Brown v. Rippey*, 5 Cir., 1956, 233 F.2d 796; *Booker v. State of Tennessee Board of Education*, 6 Cir., 1957, 240 F.2d 689, and *Holland v. Board of Public Instruction*, 5 Cir., 1958, 258 F.2d 730, the appeals were from final orders denying injunctive relief. In *Aaron v. Cooper*, 8 Cir., 1957, 243 F.2d 361, an injunction was denied because of a voluntary plan offered by the Little Rock School District which the District Court found satisfactory, but jurisdiction was retained; since the order denied an injunction it was therefore appealable whether it was deemed final or interlocutory.³ In *Board of Supervisors of L. S. U., etc. v. Ludley*, 5 Cir.,

2. For clarity we note what ought be obvious, namely, that the Board's submission of a plan of desegregation implies no acceptance of the District Judge's determinations of fact and law and no waiver of a right to appeal—any more than does the action of a losing party in any suit, either at the request of the court or of his own volition, in submitting a form of judgment conforming with findings and conclusions from which he dissents.

3. Later cases involving the Little Rock situation, *Thomason v. Cooper*, 8 Cir., 1958, 254 F.2d 808; *Aaron v. Cooper*, 8 Cir., 1958, 257 F.2d 33, affirmed *Cooper v. Aaron*, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; *Aaron v. Cooper*, 8 Cir., 1958, 261 F.2d 97, concerned attempts to frustrate or delay effectuation of the plan previously approved.

1958, 252 F.2d 372, certiorari denied, 1958, 358 U.S. 819, 79 S.Ct. 31, 3 L.Ed.2d 61; Board of Supervisors of L.S.U., etc. v. Wilson, 1951, 340 U.S. 909, 71 S.Ct. 294, 95 L.Ed. 657, and Evans v. Buchanan, 3 Cir., 1958, 256 F.2d 688,⁴ the District Court had issued mandatory injunctions directing the admission of Negro students. In *Boson v. Rippey*, 5 Cir., 1960, 275 F.2d 850, the appeal was from a refusal to modify an injunction so as to advance the dates of desegregation, this falling within another provision of § 1292(a) (1). The single case that may support appealability here is an unreported memorandum in *Mapp v. Board of Education of Chattanooga*, in which the Sixth Circuit denied a motion to dismiss an appeal, without discussion save for a reference to 28 U.S.C. § 1291 and § 1292(a) (1) and a "cf." to *Boson v. Rippey*, supra. We doubt that appellees' attempt to distinguish the *Mapp* case is successful, but we do not find the memorandum persuasive. *Boson v. Rippey* does not support the decision, for the reason indicated, as the manner of its citation perhaps recognized; and we do not know what it was that the judges found in the statutes to support their conclusion of appealability. Moreover, the subsequent proceedings in the *Mapp* case, where the District Court has already rejected the plan directed to be filed and required the submission of a new one, with a second appeal taken from that order although the first appeal has not yet been heard, indicate to us the unwisdom of following that decision even if we deemed ourselves free to do so.

There is a natural reluctance to dismiss an appeal in a case involving issues so important and so evocative of emotion as this, since such action is likely to be regarded as technical or procrastinating. Although we do not regard the policy question as to the timing of appellate review to be fairly open, we think more informed consideration would show that the balance of advantage lies in withholding such review until the proceedings in the District Court are completed. To stay the hearing in regard to the remedy, as appellants seek, would

produce a delay that would be unfortunate unless we should find complete absence of basis for any relief—the only issue that would now be open to us no matter how many others might be presented, since we do not know what the District Judge will order—and if we should so decide, that would hardly be the end of the matter. On the other hand, to permit a hearing on relief to go forward in the District Court at the very time we are entertaining an appeal, with the likelihood, if not indeed the certainty, of a second appeal when a final decree is entered by the District Court, would not be conducive to the informed appellate deliberation and the conclusion of this controversy with speed consistent with order, which the Supreme Court has directed and ought to be the objective of all concerned. In contrast, prompt dismissal of the appeal as premature should permit an early conclusion of the proceedings in the District Court and result in a decree from which defendants have a clear right of appeal, and as to which they may then seek a stay pending appeal if so advised. We—and the Supreme Court, if the case should go there—can then consider the decision of the District Court, not in pieces but as a whole, not as an abstract declaration inviting the contest of one theory against another, but in the concrete. We state all this, not primarily as the reason for our decision not to hear an appeal at this stage, but rather to demonstrate what we consider the wisdom embodied in the statutes limiting our jurisdiction, which we would be bound to apply whether we considered them wise or not.

Accordingly, the appeal is dismissed for want of appellate jurisdiction at this time. Although it should not be necessary to do so, we add, from abundant caution, that this dismissal involves no intimation on our part with respect to the propriety or impropriety of the determination of the District Court. If defendants feel that the time that has been required for the disposition of this issue compels them to request a further extension of the date for presenting a plan, they should make their application to the District Judge.

Dissent

MOORE, Circuit Judge (dissenting).

This case comes before us on a motion for a stay of that portion of a decree wherein the Board of Education of New Rochelle is "or-

4. The Court of Appeals noted in the *Evans* opinion, 256 F.2d at page 691, that in one of the seven cases the District Court had earlier made an order directing the submission of a plan from which "an appeal . . . was taken to this court but was not prosecuted and accordingly the record was returned to the court below." The later appeal, *Evans v. Ennis*, 3 Cir., 1960, 281 F.2d 385, was from a final order approving a plan which plaintiffs deemed inadequate.

dered to present to this Court [Irving R. Kaufman, D. J.], on or before April 14, 1961, a plan for desegregation¹ in accordance with this [his] Opinion * * *. An appeal "from the judgment entered in this action on January 24, 1961" (the date judgment was entered by the Clerk upon the trial court's opinion which was to constitute the court's findings of fact and conclusions of law) is now pending in this court and representations have been made that it can be heard at a comparatively early date. Upon oral argument of the motion, the court on its own motion raised the question of appealability; the parties themselves initially did not present this issue either by motion or on argument. How the panel of this court which might have heard the appeal would have ruled on the question of appealability is academic because of the decision of the majority of this panel, they will not have that opportunity. I would have deferred to them and let them have the privilege of deciding whether they should hear and decide on the merits. However, having to face this question now, I am of the opinion that an appeal may properly be taken from the judgment as entered.

The complaint, charging maintenance of "a racially segregated public elementary school," "ghettos," "minority racial groups," and denial of "due process" and "equal protection," seeks injunctive relief, both affirmative and negative, against the Board:

A. Declaring illegal and unconstitutional the City's "neighborhood school" policy (whereby children attend the school in the area of their residence);

B. Enjoining attendance in a "racially segregated" school;

C. Requiring registration in a "racially integrated" school;

D. Enjoining the construction of a public school approved for construction; and

E. Enjoining prosecution of an action commenced by the defendants.

The character of the action as an injunction proceeding was clearly established by the allegations and the relief sought. A trial was held and a judgment was entered. The trial court throughout its opinion referred to the injunctive

relief sought, which was granted in both mandatory and prohibitory form.

Section 1292(a) (1) gives this court appellate jurisdiction over interlocutory orders "granting * * * injunctions." As the majority concedes, the term "injunction" embraces an order commanding as well as prohibiting conduct. The decree (entered as a judgment) in my opinion definitely is within this category. The words are "the Board is hereby ordered to present to this Court * * * a plan for desegregation in accordance with this Opinion." The majority say that if the order in effect prohibited the Board from reconstructing the Lincoln School, the order would be "clearly appealable." Yet in the "Opinion" which is to serve as a guide for a Plan, the trial court has said, "this [the rebuilding] seems the one sure way to render certain continued segregation at Lincoln." How can this statement, together with the finding that "it is most difficult to conceive of the rebuilding of the Lincoln School as good-faith compliance with an obligation to desegregate," be reconciled with the thought that no injunction is intended. Here is virtually a pre-hearing judgment that any Plan which incorporates a rebuilding of the school on its present site will be inconsistent with the court's conception of desegregation. My colleagues cannot seriously believe that these words are not words of restraint and should not be regarded as an injunctive deterrent from building a new school. No Board would spend thousands of dollars for a new school only to be directed eventually to tear it down and build it elsewhere.

The mandatory provisions of the judgment are both direct and implied. If "the presence of some 29 white children certainly does not afford the 454 Negro children in the school the education and social contacts and interaction envisioned by Brown," how many additional white children will be required to accomplish this result?² And where will they come from? The trial court does not "conceive it to be the court's function to interfere with the mechanics of the operation of the New Rochelle school system," and "did not strike down the neighborhood school policy," but found it to be "valid only insofar as it is operated within the confines established by the Constitution." Yet the Board must submit an acceptable Plan in the light of the Court's Opinion to "avoid that very eventuality,"

1. The schools of New Rochelle have never been on a segregated basis in the sense that any Negro pupil has been denied admission to any school by reason of being a member of the Negro race and as the term is used in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, and related cases. All the schools had Negro pupils in their student bodies.

2. How can any court be sure that mere numbers can effect these assumed advantages?

namely, "the Court's taking over the running of the New Rochelle school system."

Reference to these situations is made only because I believe that they relate to the injunctive character of the judgment. It is this character which determines appealability—the only question now being considered. The merits must be considered later upon hearings in which it would appear that the Lincoln School and the Negro pupils will not be alone. Already notice has been served that "the Ward School is predominantly [sic] Jewish and the Columbus School predominantly [sic] Italian in the composition of the student bodies." The parents of the children "desire that action be brought to desegregate³ both schools." Warning is given that "if plans are made to correct the situation existing in the

Lincoln School, brought about by the neighborhood school concept, that such plans also bear in mind the religious and other imbalances [sic] also existing." When all the racial, religious and "other imbalances" have been thoroughly aired, although premature at this time, the hope is expressed that somehow the American philosophy that constitutional rights are the vested heritage of all our citizens and are not the exclusive property of any racial or religious group to be used for their own particular interests may find its way into the Plan—even if only in a footnote.⁴

Because I believe that the statute permits an appeal from this injunctive judgment, I would grant the stay, and I dissent from the dismissal of the appeal.

3. Here the word is used to indicate a predominant percentage of any race—quite a different meaning from that intended in the true "desegregation" cases.

4. Every assurance of this approach is given in the two well-reasoned opinions below. My dissent is based solely upon the belief that under the law the judgment entered in this case granting the relief specified therein is appealable.

EDUCATION

Public Schools—South Carolina

Woodrow W. HOOD, et al. v. BOARD OF TRUSTEES OF SUMTER COUNTY SCHOOL DISTRICT NO. 2, SUMTER COUNTY, SOUTH CAROLINA, et al.

United States District Court, Eastern District, South Carolina, Columbia Division, April 19, 1961, c/a 3880, _____ F.Supp._____

SUMMARY: A group of elementary school children residing in Sumter County, South Carolina, calling themselves "Turks" (on the basis of claimed ancestry of Turkish soldiers who fought in the American Revolution) and members of the Caucasian race, instituted an action in federal district court in 1953 seeking an injunction to prevent racial discrimination resulting in their being required to attend a segregated primary school for "Turks" only. Following a long course of litigation, in 1960 the Court of Appeals for the Fourth Circuit remanded the case to the district court for such further proceedings as might be appropriate in the light of plaintiffs' further pursuit of their administrative remedies. 6 Race Rel. L. Rep. 104 (1961). Defendants moved to dismiss because the issue had become moot. The district court determined that the school to which plaintiffs objected was to be closed at the end of the 1960-61 school year, that the "Turk" children had been assigned to other county schools, and that the parents of the affected children had been notified of such action. Plaintiffs therefore having successfully pursued their administrative remedy, the court held that there was now no controversy between the parties, and the court's jurisdiction had ended. The case was accordingly ordered struck from the calendar.

TIMMERMAN, District Judge.

Order

I have for disposition defendants' motion to dismiss this action "on the ground that the is-

ssues raised in the complaint * * * are now moot." Because of the great length of time this action has been on the calendar of this court a brief summary of its history is in order.

This action was commenced August 31, 1953.

An Amended complaint was filed September 24, 1953. Plaintiffs' motion for summary judgment was heard December 19, 1955. An order denying the motion was entered two days later. An appeal from that order was attempted. The Fourth Circuit Court of Appeals filed a per curiam opinion April 25, 1956, holding that the denial of a motion for summary judgment was not appealable. However, the Appellate Court then, "by considering the denial of the motion [for summary judgment] as a denial of injunctive relief," affirmed the order of this Court denying the motion for summary judgment.

Further, the Court assigned as the reason for its action the existence of administrative remedies available to the plaintiffs under an Act of the General Assembly of South Carolina in 1955, citing *Carson v. Board of Education*, 4 Cir. 227 F.2d 789. See *Hood v. Board of Trustees of Sumter County*, 4 Cir. 232 F.2d 626.

On July 11, 1960, (exactly four years, two months and sixteen days after the Court of Appeals had remitted plaintiffs to their State administrative remedies) defendants' motion to dismiss the complaint was heard, and on August 10, 1960, the complaint was ordered dismissed because of plaintiffs' failure within the stated period to pursue their administrative remedies. That decision was appealed and the Appellate Court in a per curiam opinion in effect held, (a) that in a civil rights case the delay of more than four years in pursuing an administrative remedy is not an unreasonable or prejudicial delay; (b) that if such a delay should be regarded as unreasonable or prejudicial it would be cured by invoking administrative remedies before a motion to dismiss could be or was heard; (c) it is not unreasonable or prejudicial for an appellant to withhold relevant information from a District Court hearing a motion to dismiss; and (d) that, whenever an Appellate Court has information *alle unde* the record and concludes therefrom that the District Court might have held differently had it been favored with like information, the District Court's order should be vacated. Under such rules a District Judge must have clairvoyant powers to anticipate what may be held in a so-called civil rights case by an appellate court.

Following the above stated rules the Appellate Court's opinion goes on to say:

"We, accordingly, will vacate the judgment and remand the case to the District Court for such further proceedings as may be ap-

propriate in the light of the plaintiff's pursuit of administrative remedies in process at the time of the dismissal of the complaint, remedies which, we are told, were subsequently exhausted." *Hood v. Board of Trustees of Sumter County*, S. C., 4 Cir., filed January 25, 1961.

Thus, it will be seen from what the Appellate Court said that the plaintiffs have exhausted their administrative remedies; and from what was conceded by counsel for the parties respectively at the time the instant motion to dismiss was heard, March 17, 1961, they were exhausted in favor of the plaintiffs. It is conceded that the school to which the plaintiffs objected has been or will be closed at the end of this school year, now rapidly approaching; that the so-called "Turk" children, whose parents objected to their being taught in such school, have been assigned to the Shaw Hight Elementary or Shaw Hight Junior High School, as the grades of such children may require; that all "Turk" children possessing the required qualifications, such as ages and grades, had previously been assigned to a high school in accordance with plaintiffs' wishes. By affidavit of the Superintendent of Schools in School District No. 2 of Sumter County, South Carolina, it appears that the School Board, after it had made the stated determination and it had been confirmed and ratified by the County Board of Education of Sumter County, South Carolina, on February 10, 1961, notified the parents of all children attending Dalzell School, the one to which plaintiffs objected, by letter of the action taken on the 13th day of February, 1961. Thus, it is seen that the plaintiffs have successfully pursued their administrative remedy; and there remains, in my judgment, no legitimate reason for continuing this case on the calendar of this Court. There is now no controversy between the parties.

Counsel for plaintiffs objected to ending the case and striking it from the calendar, basing his objection upon the suggestion that the School Board and the County Board of Education may not have acted in good faith, or that others succeeding the present members of said Board might reverse the action. In effect he is asking that the schools within School District No. 2 of Sumter County, South Carolina, be placed under the police supervision of this Court for all times to come. That procedure would be appropriate and expected in a Police State, but surely not in the United States of America.

I am of the opinion that the controversy upon which this case was based and this Court's jurisdiction invoked has ended; and this case should be ended and struck from the calendar

of this court, without prejudice to any right of any party hereto that may arise or accrue in the future. It is so ORDERED. This 19th day of April, 1961.

EDUCATION

Public Schools—Tennessee (Knoxville)

Josephine GOSS, et al. v. THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, et al.

United States District Court, Eastern District, Tennessee, Northern Division, March 31, 1961, Civil Action No. 3984, _____ F.Supp. _____

SUMMARY: In a suit brought by Negro children in Knoxville, Tennessee, the federal district court ordered city officials to submit a plan for desegregation of the schools. 5 Race Rel. L. Rep. 80 (1960). Thereafter, defendants offered a proposal for desegregation of one grade a year, with a liberal system of transfers. The court found the plan submitted to be a reasonable start, except that no adequate provisions were made for Negroes to take certain courses in a technical school. The plan was approved, but the board was directed to restudy the problem of technical courses. 5 Race Rel. L. Rep. 670 (1960). Subsequently, in March, 1961, the school board offered a program of desegregation for the technical schools, which permits desegregated classes when not enough students are available in either the "white" or the "Negro" school for the maintenance of separate courses in both schools. The plan as submitted to the court is reproduced below.

PLAN TO PROVIDE VOCATIONAL AND TECHNICAL TRAINING FACILITIES FOR NEGRO STUDENTS SIMILAR TO THOSE PROVIDED FOR WHITE STUDENTS AT FULTON HIGH SCHOOL

Pursuant to the judgment of the Court entered in this cause on August 26, 1960, the defendant Board of Education of the City of Knoxville herewith attaches and files a plan to provide vocational and technical training facilities for Negro students similar to those provided for white students at Fulton High School. As shown by the Certificate attached at the end of the plan, this plan has been unanimously approved by the Knoxville City Board of Education.

A SUGGESTED PLAN TO PROVIDE VOCATIONAL AND TECHNICAL TRAINING FACILITIES FOR NEGRO STUDENTS SIMILAR TO THOSE PROVIDED FOR WHITE STUDENTS AT FULTON HIGH SCHOOL

1. Continue present general policy of providing vocational facilities at Austin High School and at Fulton High School when it is shown that

fifteen or more properly qualified students are interested in the training.

2. When a course cannot be established at either Austin High School or Fulton High School because of lack of a sufficient number of qualified students, and the course is already available at the other school, the student or students may request and obtain transfer upon the terms as set out in the transfer policy now in effect in the Knoxville City Schools for vocational students, same being a part of this plan.
3. When a vocational facility is not already available at either Austin High School or Fulton High School, but a sufficient number of qualified students are available through a combination of students from the two schools, the new facility may be established at either school.
4. Factors to be used in deciding whether or not a new course is established.
 - (a) Number of qualified students as deter-

mined by Bulletin No. 1—"Administration of Vocational Education," Federal Security Agency, Office of Education. These are:

1. "The desire of the applicant for the vocational training offered;
 2. His probable ability to benefit by the instruction given; and
 3. His chances of securing employment in the occupation after he has secured the training, or his need for training in the occupation in which he is already employed."
(Enrollment in vocational classes is limited to students who have reached their fourteenth birthday.)
- (b) Availability of space to take care of the maximum as provided by the State Board of Vocational Education.
- (c) Cost as determined by the Board of Education based upon availability of funds.
5. In the continued promotion of the vocational program in the Knoxville City Schools, the Board of Education will follow the rules and regulations as set forth from time to time by the State Board for Vocational Education.
 6. The principals of the schools involved, the Director of Vocational Education, and the Superintendent acting on behalf of the Board of Education will be responsible for carrying out this plan consistent with sound school administration and without regard to race.
 7. This plan is to become effective at the beginning of the school year, September, 1961.

TRANSFER POLICY-VOCATIONAL DIVISION-
KNOXVILLE CITY SCHOOLS - "PROCEDURES"

1. The student must indicate an interest in taking a vocational course.
2. The student fills out Form #235 in triplicate at least four weeks before the end of a school semester. (Copy of Form #235 is attached and made a part of this plan.)
3. The principal is responsible for seeing that at least one standardized vocational aptitude test is given the student and that the results are recorded on Form #235.
4. Parents will be furnished a description of the vocational courses. A copy of Form #235 (the transferring document) must be approved by the parents. A statement that the student transferring intends to remain in the new school for a period of at least one school semester, contingent upon the student being able to profit by the course offered, must also be approved by the parents.
5. If the parent signs Form #235 approving the transfer, the principal will review the application, confer with the attendance worker and either approve or disapprove the transfer, writing into the record his reason, or reasons, for disapproval.
6. The student is required to fill out Form #206 (the official Enrollment Card,) omitting only the schedule section of said card. (Copy of Form #206 is attached and made a part of this plan.)
7. Forms #206 and #235, along with the student's cumulative card shall be sent to the Attendance Department for endorsement.
8. Forms #206 and #235, along with the student's cumulative card, will then be forwarded to the receiving principal.
9. The principal of the receiving school, after reviewing the student's record, either accepts or rejects the transfer, setting out in writing the reason or reasons, for rejection.
10. An appeal from the decision of the sending principal or of the receiving principal may be made to the Superintendent by the student requesting the transfer. An appeal from the decision of the Superintendent may be made to the Board of Education. Said appeal to the Superintendent shall be filed in writing with the Superintendent within four weeks after the student has received notice of the decision of the principal from which the appeal is taken. The appeal from the Superintendent's decision must be filed in writing with the secretary of the Board of Education within two weeks after the student receives notice of the Superintendent's decision.
11. No student will be accepted at either Austin High School or Fulton High School without following the above transfer procedure. (The requirement in Item #2 above shall not apply to a new student who becomes a

legal resident of the City of Knoxville after deadline referred to in said item.)

I hereby certify that the above plan was unanimously approved by the Knoxville City Board of Education at a special meeting on Thursday,

March 23, 1961.

s/ John F. Burkhart M.D.

President

s/Roy E. Linville

Secretary

EDUCATION

Public Schools—Tennessee

Deborah A. NORTHCROSS, et al. v. The BOARD OF EDUCATION OF THE CITY OF MEMPHIS, et al.

United States District Court, Western District of Tennessee, Western Division, May 2, 1961, Civil Action No. 3931, _____ F.Supp. _____.

SUMMARY: Memphis, Tennessee, residents brought action in federal district court against the Memphis Board of Education for an injunction against the operation of a compulsory bi-racial school system or, in the alternative, for an order that defendants present a plan for integrating the Memphis school system. The Board argued that it did not operate a compulsory bi-racial school system, and would effect integration of the school system under the Tennessee Pupil Assignment Law. Plaintiffs conceded that they had not pursued their administrative remedies by applying for transfer under the assignment law. The court found that the Board had given public assurances that the law would be impartially administered, and that plaintiffs' fears that the Board would not act in good faith were not justified. The injunction was denied on the basis of findings that the schools were not bi-racially operated and that plaintiffs had failed to exhaust their administrative remedies. But the prayer for alternative relief was sustained, the court approving the Tennessee Pupil Assignment Law as an adequate plan of desegregation.

BOYD, District Judge

FINDINGS OF FACT, CONCLUSIONS OF LAW

This cause came on to be heard by the Court sitting without a jury. This is a suit in which the plaintiffs seek an injunction against the defendants, being the Board of Education of the Memphis City Schools and the individual members and superintendent thereof, enjoining the defendants from operating a compulsory bi-racial school system in Memphis, Tennessee, and in the alternative plaintiffs ask that the Court direct the defendants to present a plan for desegregation, or, more accurately, a plan for compulsory integration of the Memphis school system.

In their answer, defendants deny that they operate a compulsory bi-racial school system.

Defendants admit that the school system is not racially integrated for the reason that no application has been made by a member of one race to attend a school attended solely by members of another race and defendants do not believe that they are obligated to introduce compulsory integration.

Defendants admitted the allegation of the Complaint that plaintiffs have not exhausted the administrative remedy afforded them under the Pupil Assignment Law, being Sections 49-1741, et seq., Tennessee Code Annotated, and that such willful failure or refusal is fatal to their Complaint, particularly in view of the public assurances given to plaintiffs and their counsel that this Act would be administered on a non-racial basis.

The Court, upon the pleadings, evidence and arguments of counsel, makes the following:

FINDINGS OF FACT

I. Defendant, Board of Education of the Memphis City Schools, is a corporation chartered by the General Assembly of the State of Tennessee, and is vested with the management and control of the school system in said City.

II. The plaintiff, Mrs. Marjorie McFerren, being the only one of the parties plaintiff who testified, is a resident of Memphis, Tennessee, and is the mother of Gerald E. Young, incorrectly referred to in the Complaint as Gerald E. McFerren; and the said Gerald E. Young attends the school system operated by defendants. There is no evidence in the record of the true residence of the remaining plaintiffs nor is there evidence as to the status of the plaintiffs as pupils in the Memphis School System.

III. Defendants do not operate a compulsory bi-racial school system; nor do defendants maintain a dual schedule or pattern of school zone lines based upon race or color; nor do defendants assign pupils to the schools in the City of Memphis on the basis of the race or color of the pupils; nor do defendants assign teachers, principals and other school personnel to their school system on the basis of race or color of the personnel to be assigned and on the basis of race and color of the children attending the schools to which the personnel is to be assigned; nor do defendants subject Negro children seeking assignment, transfer or admission to the schools of the City of Memphis to criteria, requirements and prerequisites not required of white children seeking assignment, transfer or admission to the schools of the City of Memphis; nor do defendants approve budgets, make available funds, approve contracts and policies which are designed to perpetuate, or maintain, or support a school system operated on a compulsory racially segregated basis.

IV. The Memphis Public School System is the fifteenth largest system, in terms of pupil enrollment, in the United States. Its enrollment as of June 6, 1960, was as follows:

Gross enrollment—107,090¹

1. *Gross enrollment*: The gross enrollment is increased every time a student originally enrolls in any Memphis City Schools, including transferring from one school within the Memphis City School System to another. The gross enrollment is not reduced at any time that a student either leaves the Memphis School System or transfers within the system to another school.

Net enrollment—101,907²

Membership enrollment—95,203³

Average membership enrollment—95,317⁴

Average number present—90,501⁵

Average number absent—4,812⁶

The percentage of non-white enrollment in the Memphis city schools as of June 6, 1960, was as follows:

Gross enrollment—43.7%

Net enrollment—43.4%

Membership (20th day)—44.2%

Average membership—44.2%

Average number present—43.8%

Average number absent—50.7%

V. The school zone maps introduced in the cause have no significance as evidence of a compulsory bi-racial school system. The sole purpose of such zone maps is to provide an area containing school population adequate for the efficient and economical utilization of the facilities and personnel of a particular school.

In this community, the vast majority of the patrons of the school system have voluntarily elected to have their children attend school with members of their own race. School authorities must take this fact into account in making provision for an adequate school population to assure efficient management of its schools. The zone lines reflected on the maps are flexible and every patron may have speedy recourse to the Board of Education for transfer of their child to another school without regard to race.

VI. The Board of Education, and its staff, acting under the Pupil Assignment Law have granted a number of transfers from one at-

2. *Net enrollment*: Net enrollment includes only original enrollment in the school system during the year. Students who transfer within the school system and who re-enter are not counted the second time in the net enrollment. The net enrollment is not decreased at any time a student leaves a given school or the school system.
3. *Membership (20th day)*: The actual number of students in attendance on the 20th day of the pupil accounting period.
4. *Average membership enrollment*: Computed by dividing total number of days belonging (this term means the number of days that the students on roll belonged in school) by the number of days in the period (20).
5. *Average number present*: The Average Daily Attendance is determined by taking the total days present and dividing by the number of days in the period.
6. *Average number absent*: The average number absent is determined by taking the total days all pupils were absent and dividing by the number of days in the period.

tendance zone to another upon application of its patrons.

VII. Defendants, who are charged with the responsibility of operating the vast Memphis School System, are fully cognizant of the decision of the United States Supreme Court in *Brown v. Board of Education* and the law announced in that case, that a state agency may not deny a child the right to attend the public school of his choice because of race or color; and said defendants clearly intend to cooperate to the end that the transition from the segregated school to the integrated school should be accomplished with dispatch and that the numerous problems incident to such a changeover be kept to a minimum. The Court and the defendant Board members are of the opinion that this transition should be accomplished more expeditiously and more satisfactorily through resort to the Tennessee Pupil Assignment Law of 1957, being Sections 49-1741, et seq., Tennessee Code Annotated.

VIII. The defendants' intention to effect the integration of their school system under the Pupil Assignment Act has not been a secret but has been generally known to the public, including the plaintiffs in this case, for quite sometime; that the operation of the school system under the law has been made known by the Board of Education to the members of its staff and the principals of its schools; and that at a public meeting of the Board of Education held on February 6, 1960, each of the plaintiffs and their counsel were advised in clear and unequivocal terms that applications by its Negro patrons for the assignment or transfer of a Negro child to a school heretofore attended solely by white children would be duly considered and acted upon by the Board of Education under the Pupil Assignment Law without regard to the race or color of the applicant.

IX. That the Board of Education at said meeting of February 6, 1960, and on other public occasions, as well as in the sworn testimony of the members of said Board appearing in Court, has evidenced all good faith to this Court of its intention to comply with the decision of the United States Supreme Court and in all good faith to consider applications for transfer without regard to race. The Court finds, therefore, that plaintiffs' fears that the law will be administered adversely to them are totally unfounded. The attitude of the plaintiffs toward

the Pupil Assignment Law is based, not upon experience or upon what is shown to have occurred, but rather upon what plaintiffs seem to fear will occur. Such attitude is totally unfounded.

X. The Tennessee Pupil Assignment Law furnishes the plaintiffs an effective and adequate State remedy to effect the objectives which they seek in their Complaint.

XI. The plaintiffs admit that they have never exhausted the administrative remedies afforded them under said assignment law and, in fact, the Court finds that the plaintiffs, for reasons best known to them, have refused to even initiate the remedy afforded them by that law in spite of the public assurance to the plaintiffs by defendants of their good-faith application of said law.

XII. The application of Mrs. Marjorie McFerren for a transfer of her child was made in September, 1958; that in June, 1958, pursuant to the Pupil Assignment Law this pupil had been assigned to the Hyde Park School; that Mrs. McFerren desired that he attend the Vollentine School and upon presenting the child for registration at Vollentine, she was referred to the Board of Education; that such referral was the established procedure without regard to the race or color of the applicant; that before appearing at the Board of Education she registered her child at Hyde Park. She then appeared at the Board of Education and requested a transfer on the grounds of convenience as shown in the application, Exhibit 40. That said application was rejected by the Superintendent and Mrs. McFerren was advised of her right of appeal to the Board of Education, as provided by the Pupil Assignment Law, and assured that all time limitations on her application for transfer would be waived pending a determination of the matter; and that though testifying that she did not know of this right of appeal, the Court finds that she had full knowledge of same but failed, refused and neglected to exhaust the administrative remedy afforded her.

XIII. Two Negro high school pupils testified that in September, 1960, they appeared at the Board of Education and requested a transfer from Melrose High School to South Side High School nearer to their home. The proof shows that it has long been the practice and policy of the Board of Education to consider pupil transfer applications only when the application is made

by the parents; that utter confusion in the school system would result if pupils were permitted to request transfers from one school to another and the practice of the Board of Education to require transfer applications to be made by parents is a completely reasonable one. In line with the aforementioned policy of the Board of Education, the transfer applications of these two Negro high school pupils were never considered by the Board of Education or any member of its staff. The applications for transfer were not rejected on the basis of the race of the applicants.

XIV. In no instance has it been shown that the Board of Education of the Memphis City Schools has denied an application for transfer upon the basis of the race or color of the applicant upon proper application being made.

XV. The Tennessee Pupil Assignment Law was enacted by the General Assembly of the State of Tennessee several years prior to the filing of this suit. The Court judicially knows that the law was enacted in a background and with an attitude of compliance with the decision of the Supreme Court of the United States in *Brown v. Board of Education*, 349 U. S. 294, rather than in a background of opposition to said decision.

XVI. In the Court's judgment and as a matter of fact, the Tennessee Pupil Assignment Law furnishes as effective a plan for compliance with the decision of the Supreme Court of the United States as this Court could devise; provided, of course, that the law is administered in good faith. The defendants have assured the general public, including the plaintiffs, and have assured this Court during the trial that the law will be administered on a non-racial basis and in all good faith. It would be much better for the defendants to operate the school system within the framework of the state law rather than to have this Court find itself in the business of operating the Memphis schools.

XVII. To date, the plaintiffs have shown no inclination to comply with the plan of desegregation afforded them by the Tennessee Pupil Assignment Law. In order for this plan to work there must be not only compliance with that law but cooperation on the part of both the plaintiffs and the defendants. The plaintiffs share an equal obligation with the defendants in applying the provisions of that law and the

doors of this Court will always be open to protect the constitutional rights of the plaintiffs if that law and the plan of desegregation provided therein are unconstitutionally applied.

XVIII. During argument the Court inquired of plaintiffs' counsel concerning the so-called grade-a-year plan of desegregation. Plaintiffs rejected this plan. The Court feels that the plan offered under the Tennessee Pupil Assignment Law permitting the transfer of any qualified pupil is much better than the grade-a-year plans so frequently discussed. The plan of the Tennessee Pupil Assignment Law is a sound and complete one and is fully adequate to insure a fair deal to all of the citizens of this community.

CONCLUSIONS OF LAW

I. The Court has jurisdiction of the parties and the subject matter of this cause.

Title 28, U.S.C.A. Sec. (1343) (3)

Title 42, U.S.C.A. Sec. 1983

II. The Supreme Court of the United States has declared that the state may not deny to any person on account of race the right to attend any school that it maintains.

Brown v. Board of Education, 347 U. S. 488, 74 Sup. Ct. 686, 98 L. Ed. 873

Brown v. Board of Education, 349 U. S. 294, 75 Sup. Ct. 753, 99 L. Ed. 653

Briggs v. Elliot, 133 Fed. Supp. 864, 865

Kelly v. Nashville (6 Cir.) 270 F. (2d) 209.

III. If the schools which the state maintains are open to children of all races, no violation of the constitution is involved even though the children of different races voluntarily attend different schools as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend.

Kelly v. Nashville, supra

Briggs v. Elliot, supra

IV. The Constitution does not require integration; it merely forbids discrimination. It does not forbid such segregation as follows as the result of a voluntary action; it merely forbids the use of governmental power to enforce segregation.

Kelly v. Nashville, supra

Briggs v. Elliot, supra

V. Each case of this type must be determined

upon the basis of the facts and evidence adduced in each particular case.

Kelly v. Nashville, *supra*

VI. The Tennessee Pupil Assignment Law, being Sections 49-1741, et seq., Tennessee Code Annotated, furnishes to plaintiffs an effective and adequate remedy for the relief which they seek in their Complaint.

Shuttlesworth v. Board of Education, 162 F. S. 376, affirmed 358 U. S. 101; 3 L. Ed. (2d) 145; 79 Sup. Ct. 221;

Carson v. Board of Education, 227 F. (2d) 789;

Holt v. Raleigh City Board, 265 F. (2d) 95, cert. den. 361 U. S. 818, 4 L. Ed. (2d) 63; 80 Sup. Ct. 59.

VII. Plaintiffs are obligated to exhaust the administrative remedy afforded them before seeking judicial relief.

Carson v. Board of Education, *supra*;

Hood v. Board of Trustees, 232 F. (2d) 626, Cert. Den. 352 U. S. 870, 1 L. Ed. (2d) 76, 77 Sup. Ct. 95;

Carson v. Warlick, 238 F. (2d) 724;

Covington v. Edwards, 264 F. (2d) 780;

Holt v. Raleigh City Board, *supra*;

Dove v. Parham, 271 F. (2d) 132;

Cook v. Davis, 178 F. (2d) 595;

Thomas v. Chamberlain (1955, Tenn.) 143 F. S. 671, affirmed 236 F. (2d) 417 (6 Cir.)

Donaldson v. U. S. (6 Cir.) 264 F. (2d) 804.

JUDGMENT

The issues in the above-entitled action having been regularly brought on for trial before the Honorable Marion S. Boyd, District Judge, without a jury, the parties having appeared by their respective counsel and the issues having been duly tried; and the Court having filed its opinion on the fourteenth day of April, 1961, and its Findings of Fact and Conclusions of Law directing the entry of Judgment on the second day of May, 1961;

And it appearing to the Court that the plaintiffs' prayer for alternative relief directing the approval of a plan of desegregation should be sustained; and that the Tennessee Pupil Assignment Law furnishes a fully adequate and efficient plan of operating the Memphis City School System on a racially non-discriminatory basis;

IT IS ORDERED, ADJUDGED AND DECREED that the alternate prayer of the Complaint be sustained and the Tennessee Pupil Assignment Law be approved as the plan of desegregation for the Memphis City School System;

And it further appearing to the Court that defendants do not operate a compulsory bi-racial school system and that the plaintiffs have not exhausted the administrative remedies afforded them under the Tennessee Pupil Assignment Law.

IT IS ORDERED, ADJUDGED AND DECREED that the remaining prayers of the Complaint be denied.

The costs of the cause are assessed equally against the parties.

EDUCATION

Public Schools—Virginia

Eva ALLEN, et al. v. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, Virginia, et al.

United States District Court, Eastern District of Virginia, Richmond Division, Civil Action No. 1333, F.Supp. _____.

SUMMARY: Following the return of one of the original *School Segregation Cases* [1 Race Rel. L. Rep. 5, 11 (1954) and (1955)] from the United States Supreme Court to the federal district court in Virginia, a three-judge district court entered a decree requiring the admission of Negro children to schools in Prince Edward County without discrimination on the basis

of race, and with all deliberate speed. 1 Race Rel. L. Rep. 82 (1955). A long course of litigation ensued, culminating in the county's action of closing all of its public schools. See 1 Race Rel. L. Rep. 1055 (1956); 2 Race Rel. L. Rep. 341 (1957); 2 Race Rel. L. Rep. 1119 (1957); 3 Race Rel. L. Rep. 964 (1958); 4 Race Rel. L. Rep. 256, 297, 538 (1959); 5 Race Rel. L. Rep. 412 (1960).

In April, 1961, the attorney general of the United States petitioned the federal district court to be allowed to intervene and file a supplemental complaint in which he asked that the court enter an order enjoining the county from refusing or failing to maintain free public schools in the county, enjoining the paying of tuition grants to students attending private schools so long as public schools are closed, and enjoining any of the defendants, including the state of Virginia, from the payment of any state funds for the maintenance of public schools anywhere in the state so long as schools are closed in Prince Edward County. After hearing, the court ruled that the United States had no right to intervene as a party plaintiff until the court had first determined that its orders are being violated or circumvented. Also rejected was the attorney general's argument that the original plaintiffs could not adequately represent the interest of the United States since they could not maintain an action against the state of Virginia under the Eleventh Amendment to the Constitution. The court ruled that to grant the injunctive relief sought would require a three-judge court, as provided by Title 28, Section 2281 of the U.S. Code. It was concluded that the Attorney General had failed to sustain his motion for intervention as a matter of right, and also that permissive intervention should be denied because to grant it would "unduly delay and prejudice the adjudication of the rights of the original parties."

LEWIS, District Judge.

The United States seeks to intervene as a party plaintiff in the above captioned matter. A better understanding of the question now before the Court necessitates a brief history of the main action.

In compliance with the decision rendered in *Brown v. Board of Education*, 349 U.S. 294 (1955), an order was entered in this suit under date of November 26, 1958, providing, among other things, that the defendants proceed promptly with the formulation of a plan to comply with the order of this Court heretofore entered enjoining them from discriminating against the plaintiffs in admission to the public schools of the County solely on account of race. Said defendants were further directed to report to the Court on or before January 1, 1959, the progress made in the formulation of such plan and were further directed to comply with the terms of the injunction heretofore entered commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit under date of May 5, 1959, reversed this Court and remanded the case, with directions to issue an order in accordance with that opinion, which provided, among other things, that the defendants be enjoined from any action that regulates or affects on the basis of color the enrollment

or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County, and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions of said order being:

"The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.

"That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this and at the earliest practical day."

The Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

Under date of July 8, 1960, counsel for the plaintiffs filed a motion to intervene additional plaintiffs; a motion for leave to file a supplemental complaint and to add additional defendants; to all of which motions the defendants objected. On September 16, 1960, the said motions were granted. By consent decree, the time for the filing of responsive pleadings to the supplemental complaint was extended to October 24, 1960.

The defendants filed motions to dismiss the supplemental complaint. Prior to the hearing of said motions, the plaintiffs on January 13, 1961, filed a motion for leave to amend their supplemental complaint and to add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants.

Upon consideration of the said motions the Court under date of April 24, 1961, granted plaintiffs leave to amend their supplemental complaint and to add the Board of Supervisors of Prince Edward County and J. W. Wilson, Jr., Treasurer of Prince Edward County, as additional defendants. The order fixed May 1, 1961, as the last date for the plaintiffs to offer any further amendments to their pleadings and as the last date for the defendants to file any motions in response thereto. The hearing of the motions thus filed was set for May 8, 1961.

Under date of April 26, 1961, the United States, by Robert F. Kennedy, Attorney General, and Joseph S. Bambacus, United States Attorney for the Eastern District of Virginia, moved the Court for leave to intervene as a plaintiff in this action and to file a complaint in intervention, and to add as parties defendant the Prince Edward School Foundation, a corporation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia.

The United States, in support of its motion to intervene, alleges that intervention

"is necessary in order to prevent the circumvention and nullification of the prior orders of this Court and to safeguard the due administration of justice and the integrity of the judicial processes of the United States.

"The claim of the United States, as set

forth in the complaint in intervention, involves questions of both law and fact in common with those raised by the amended supplemental complaint filed by the plaintiffs herein."

The motion was made under and pursuant to Sections 309 and 316, Title 5, United States Code, and Rule 24 of the Rules of Civil Procedure. The United States requested a hearing, on its motion to intervene, on May 8, 1961. The motion was then heard.

All of the defendants to this suit and the additional parties sought to be made defendants objected to the intervention of the United States as a party plaintiff. The plaintiffs supported the Government's position. The matter was fully and ably argued by counsel for all parties and the written briefs have been carefully considered by the Court.

Rule 24 of the Rules of Civil Procedure provides for intervention of right and permissive intervention.

Rule 24. (a) "Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

It is therefore necessary to first determine whether or not the United States, as a matter of right, may intervene in this suit as a party plaintiff. If it has such a right, its application therefor must be "timely" filed; the rule specifically so provides. The able Assistant Attorney General of the United States, both in his oral argument and in his written brief, totally ignored this requirement of the rule. The Government offered no excuse or extenuating circumstances justifying a delay of more than a year in the filing of the Government's motion in intervention.¹

1. The order of this Court which they allege as being circumvented, was entered April 22, 1960. The Government's motion in intervention was filed April 26, 1961.

In view of the necessity of scheduling an early hearing on the merits of the plaintiff's amended supplemental complaint and the unexplained delay on the part of the Government in filing its motion in intervention, there is a serious question in the Court's mind as to whether or not the motion was "timely" filed.

The Government does not contend that it has a statutory right to intervene in this suit. However, the Court's attention has been called to the fact that several bills have been introduced in the Congress of the United States and some are now pending, specifically granting unto the Attorney General of the United States the right to intervene in suits of this type as a party plaintiff. None of these bills, however, have been enacted into law. Thus to grant intervention in this case, in the absence of statutory authority, would appear to be contrary to the intent of Congress. This, however, the Court need not decide, because the Attorney General relies primarily on Section (2) of Rule 24 (a).

He contends:

"The interest of the United States, which is unique, is not represented by any of the existing parties. The plaintiffs seek to secure their constitutional rights, but the United States seeks to preserve its judicial processes against impairment by obstruction or circumvention. These clearly are distinct interests. Moreover, the due administration of justice is a sovereign interest that cannot properly be entrusted for safeguarding to private parties. The representation of the interest of the United States by the plaintiffs is plainly inadequate."

The Attorney General further contends:

"The United States, by its complaint in intervention, has joined the State of Virginia in order to secure complete relief in this action, in which the United States contends that the State is circumventing this Court's order by action which is unlawful in that it denies to the residents of Prince Edward County the equal protection of the laws. But the State of Virginia can be made a defendant only by the United States, since the Eleventh Amendment of the United States Constitution bars the plaintiffs from suing a state without its consent."

In support of this contention, the Attorney General seeks to parallel the situation in Prince

Edward County with the former situation in Little Rock and New Orleans. The facts in these cases do not justify such a comparison. In the latter cases, open defiance of Federal Court orders was obvious. In Virginia this complex problem has been and is being solved in a lawful and proper manner through the courts. There has been no known defiance of this Court's orders by either the State of Virginia or the County of Prince Edward. Even under the situation then existing in Little Rock and New Orleans, the Attorney General, insofar as this Court knows, did not move to intervene as a party plaintiff for any purpose. To the contrary, the Government's participation in those cases was at the Court's invitation as *amicus curiae*.²

The precise question before this Court, in the case under consideration, is whether or not the defendants, or any of them, are violating or circumventing its orders. To find the defendants guilty of so doing without a hearing would be a clear violation of the defendants' constitutional rights. That, this Court will not do. The United States has no right to intervene as a party plaintiff in this case on that ground until this Court has first determined that its orders are in fact being violated or circumvented.

The Attorney General further argues, however, that the plaintiffs are unable to represent adequately the interest of the United States because the plaintiffs can not make the Commonwealth of Virginia a party defendant by virtue of the Eleventh Amendment to the United States Constitution.³ Surely, that is not the "interest" referred to in the statute. If the United States has a cause of action against the Commonwealth of Virginia, in this or any other type of suit, the right to maintain that cause of action is not predicated upon the right to intervene as a party plaintiff in a suit instituted by private plaintiffs seeking to secure their constitutional rights.

The Attorney General cites numerous cases in support of his contention that the United States by virtue of its national sovereignty has a sufficient general interest in this case to be

2. A party plaintiff assumes the role of a party litigant. It is allowed to file pleadings, offer evidence, file briefs and seek relief. It has a right to reasonably control its side of the case; *amicus curiae* is technically "a friend of the Court," as distinguished from an advocate. It arises only via an *ex parte* order of the Court and fully advises the Court on the law in order that justice may be attained.

3. See *United States v. Texas*, 143 U.S. 621; *United States v. California*, 332 U.S. 19.

permitted to intervene of right. Suffice it to say that none of the cited cases are sufficiently in point with the facts in this case to sustain his contention.

"It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights." See *Jewell Ridge Coal Corp. v. Local No. 6167, etc.*, 3 FRD 251. See also *Radford Iron Co. Inc. v. Appalachian Electric Power Co.*, 62 F.2d 940.

The Attorney General next contends Rule 24 must be considered in connection with Title 5, Sections 309 and 316,⁴ U.S.C.A. With this we do not disagree. Clearly, these statutes give very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard Government rights and properties.

In our view of the matter, having reached the opinion that the United States does not have such an "interest" in the instant case as is required by Rule 24 (a), these statutes are not applicable, for they likewise require the United States to have such an "interest".

Therefore this Court is of the opinion that the United States has no absolute right of intervention in this suit under Rule 24 (a).

The Attorney General further argues, however, that if the Court be of such opinion, the United States, in any event, ought to be permitted to intervene under Rule 24 (b) Permissive Intervention, which reads as follows:

"Upon timely application anyone may be permitted to intervene in an action: (1)

4. Section 309. "Conduct and argument of cases by Attorney General and Solicitor General. Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so." Section 316. "Interest of United States in pending suits. The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any state, or to attend to any other interest of the United States."

when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The granting of the motion under this section lies within the sound discretion of the Court and in so determining the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the judicial exercise of this discretion it is deemed proper that the allegations of the proposed complaint of intervention be carefully examined and compared with the allegations of the amended supplemental complaint now pending before this Court.

The material allegations of the complaint in intervention are summarized as follows:

Section 129 of the Constitution of Virginia requires that the General Assembly establish and maintain a system of public free schools throughout the state; prior to June 1959, free public schools were being maintained in Prince Edward County, educating approximately 1700 Negro and 1400 white pupils; segregated schools were then being maintained; under date of May 17, 1954, the Supreme Court of the United States held that state operation of racially segregated schools in Prince Edward County was unconstitutional; in July 1954, the Supervisors of Prince Edward County expressed opposition to the operation of racially unsegregated public schools; in July 1955, this Court entered an order requiring that the public schools in Prince Edward County be racially desegregated with all deliberate speed; in May 1956, the Board of Supervisors of Prince Edward County, in response to a request of 4,000 white citizens, adopted a resolution declaring it to be the policy of the Board that no county tax levy should be

made for operation of public schools on a non-segregated basis; on May 5, 1959, the Court of Appeals for the Fourth Circuit directed the entry of an order requiring that the public schools of Prince Edward County be operated on a racially non-discriminatory basis, commencing in the fall of 1959; Articles of Incorporation were executed on May 26, 1959, for the creation of Prince Edward School Foundation for the purpose of operating elementary and high schools in Prince Edward County for the education of children of the white race exclusively; on June 2, 1959, the Board of Supervisors of Prince Edward County did not levy taxes for the operation of public schools for the school year 1959-60; public schools in Prince Edward County were not opened for the fall semester of 1959 and have not been opened since that date; the Prince Edward School Foundation began operating in September 1959; approximately 1400 white children attended; no tuition or fees were charged for educating these students; the Foundation obtained its funds through contributions for the school year 1959-60; on April 22, 1960, this Court entered an order enjoining the defendants from any action that regulated or affected the enrollment or education of Negro children on the basis of race or color to the public high school of Prince Edward County and further requiring the defendant to make plans for the admission of pupils to the elementary schools of the County without regard to race or color at the earliest practical date; in June 1960, the Board of Supervisors adopted a budget including funds for educational purposes, but without providing funds to permit operation of public schools; in July 1960, the Board of Supervisors adopted an ordinance requiring the County Treasurer to allow a certain credit against real estate and personal property taxes on account of any contributions made to a certain private school located in Prince Edward County; the Board of Supervisors on the same day adopted a tuition grant plan of not less than \$100.00 per year per child who was enrolled in a private non-sectarian school within the County or in a public school within the state; that the only non-sectarian private school within the County was the Prince Edward School Foundation; \$58,000.00 in tax credits have been granted on account of contributions to the Prince Edward School Foundation; the Foundation for the school year 1960-61 charged a \$240.00 tuition for elementary schools and a \$265.00 tuition

for high schools; tuition grants from the state and county amount to \$225.00 for elementary students and \$250.00 for high school students; in December 1960, a number of Negro residents petitioned the Board of Supervisors to reopen the public schools of the County; this request was denied; since June 1959, the defendants have failed and refused to maintain free public schools in Prince Edward County; the purpose and effect has been and is to prevent the operation of public schools in compliance with the orders of this Court on a racially non-discriminatory basis; since June 1959, the defendants have maintained the schools of the Prince Edward School Foundation for the education of white children residing in Prince Edward County; since that date no schools have been operated in Prince Edward County for Negro children; a system of free public schools is being maintained elsewhere in the State of Virginia; the failure and refusal of all of the defendants, including the State, to maintain free public schools in Prince Edward County, while such a system is being maintained in the rest of the State, denies to the Negro residents of the County, rights secured under the Fourteenth Amendment to the Constitution.

The complaint in intervention prays that this Court enter an order enjoining the defendants from failing or refusing to maintain free public schools in Prince Edward County; for an order enjoining the defendants from paying tuition grants to students attending Prince Edward School Foundation so long as public schools are closed; for an order enjoining certain defendants from allowing any credit to taxpayers on account of contributions to the Prince Edward School Foundation, during the time public schools are closed in Prince Edward County; for an order enjoining all the defendants, including the State of Virginia, from the payment of any funds of the State for the maintenance of public schools anywhere in Virginia during such period as public schools are closed in Prince Edward County.

The allegations of the amended supplemental complaint are substantially the same except that paragraph 16 of the amended supplemental complaint alleges that the County School Board of Prince Edward County is considering and contemplating the conveyance, lease or transfer of the public schools and public school property to some private corporation, etc.

The amended supplemental complaint does

not, however, seek to make Prince Edward School Foundation, the State of Virginia, or its Comptroller General parties defendant.

The prayers of the amended supplemental complaint request this Court to enter an order enjoining the present defendants (not the State of Virginia) from refusing to maintain free public schools in Prince Edward County; from expending public funds for the direct or indirect support of any private school which excludes the infant plaintiffs and others similarly situated by reason of race; from crediting any taxpayer with money paid or contributed to any private school which excludes the infant plaintiffs and others similarly situated for the reason of race; from conveying, leasing or otherwise transferring title, possession or operation of public schools and facilities incidental thereto to any private corporation.

It is apparent from a comparison of the complaint in intervention with the amended supplemental complaint that the material difference therein is that the United States in its complaint in intervention seeks to make the Prince Edward School Foundation, the State of Virginia and its Comptroller General parties defendant and to have this Court enter an order enjoining the State of Virginia from failing or refusing to maintain free public schools in Prince Edward County and enjoining the State from the expenditure of any of its funds for the maintenance of free public schools throughout the rest of Virginia so long as the free public schools of Prince Edward County remain closed. Such relief, if granted, would be unnecessarily punitive, in that it would require the closing of most, if not all, of the free public schools in Virginia. Whether the means, if legal, justifies the end is questionable, to say the least.

Although the Assistant Attorney General, in his argument before the Court, stated that "it was not the intent of the Government to force the closing of the public schools in Virginia; to the contrary, the purpose of the Government was to force the opening of the schools in Prince Edward County", he refused to delete this prayer from the complaint in intervention, stating "he did not have the authority to so do." Therefore this Court can only conclude, if the Government be permitted to intervene as a party plaintiff, it would urge this Court to enter an order that could jeopardize the education of several hundred thousand Virginia children who have no

responsibility whatsoever for the closing of public schools in Prince Edward County.

If this Court were to entertain the complaint in intervention in its present form, it would be necessary for the Court to construe and interpret certain sections of the Constitution of Virginia and laws adopted pursuant thereto pertaining to the maintenance of a system of free public schools in the State of Virginia. Abstinence in state affairs when not in conflict with the United States Constitution⁵ has long been the federal policy. "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U.S. 521, 525, as their 'contribution in furthering the harmonious relation between state and federal authority.' *Railroad Comm'r. v. Pullman Co.*, 312 U.S. 496." *Harrison v. NAACP*, 360 U.S. 167.

Further, since the complaint in intervention seeks to make the Commonwealth of Virginia a party defendant, thereby making the suit a direct action against the State, it would be necessary, if an injunction were to issue against the State, to convene a three-judge District Court as provided for in Title 28, Section 2281 of the United States Code. These are not questions of law or fact in common with the main action. To the contrary, they are new and independent assertions, which admittedly are not alleged in the amended supplemental complaint. A determination of these questions, whether heard by a three-judge court or by the Supreme Court of Appeals of Virginia, by virtue of the Doctrine of Abstention, will materially delay the adjudication of the private constitutional rights asserted by the individual plaintiffs in the main action. Further delay would inevitably occur as a result of an appeal to the Supreme Court of the United States, during which interim the "status quo" would be maintained in Prince Edward County.

The Attorney General cites many of the same authorities and arguments in support of permissive intervention as were asserted in support of

5. This Court knows of no provision of the United States Constitution which provides that the states shall provide a system of free public education and none has been cited.

intervention of right. It is unnecessary to comment further on most of them. However, the Attorney General insists that the Department of Justice is better equipped than the private plaintiffs to represent and defend the national interest. He states:

"It has an experienced legal staff which is conversant with the legal issues involved herein. It also has the investigative facilities of the Federal Bureau of Investigation and the services of the United States Attorney to attend upon the Court. Thus, the public interest in assuring that all the implications of the issues are brought to the attention of the Court warrants the Government's intervention here."

This is undoubtedly true, but whether or not the Department of Justice should use its vast

resources as a party litigant in a suit it admits was instituted by private citizens to secure their constitutional rights, is a question this Court need not decide.

The Court being of the opinion the granting of intervention will unduly delay and prejudice the adjudication of the rights of the original parties, the motion of the United States to intervene as a party plaintiff and to add as parties defendant the Prince Edward School Foundation, the Commonwealth of Virginia, and Sydney C. Day, Jr., Comptroller of Virginia, is denied.

Counsel for the defendants should prepare an appropriate order, in accord with this opinion, submit it to counsel for plaintiffs and counsel for the United States for approval as to form, and present the same for entry herein.

EDUCATION

Public Schools—Virginia

DODSON, et al. v. SCHOOL BOARD OF CHARLOTTESVILLE, et al.

United States Court of Appeals, Fourth Circuit, April 14, 1961, No. 8238, 289 F.2d 439.

SUMMARY: Ten Negro students (4 elementary, 6 high school), in the Charlottesville, Virginia, public schools appealed to the Court of Appeals for the Fourth Circuit the action of the district court sustaining the denial by the city school board of their applications for enrollment in city white schools, and in that connection sought a re-examination of the desegregation plan presently in effect. [For the plan and other previous developments in the progress of desegregation of the Charlottesville public schools, see 4 Race Rel. L. Rep. 881 (1959)]. The court ruled that residence and academic achievement tests may validly be applied in determining what schools children attend, provided factors of race and color are not considered; thus, unless the criteria had been discriminatorily applied here, appellants have no cause for complaint. And the desegregation plan was held not to be constitutionally objectionable on its face since it provides a reasonable procedure without consideration of race or color whereby school assignments are to be regulated. However, the court expressed concern about the way the plan was being administered contrary in some respects to its express provisions and in violation of the Fourteenth Amendment. At the elementary school level, the court objected to the fact that Negro pupils in one district are not, as are whites, initially assigned to the school of their district, but to the all-Negro school, and that to attend the school in their district they have to apply for transfers, a procedure to which whites are not subjected. Also, the court referred to the facts that white children living in the district wherein the all-Negro school is located are not initially assigned there, as Negroes living there are, but go directly to one of the other schools, and that to attend the school of their district (the Negro school) such white children would have to apply for transfers. As to the high schools, the court found the plan being applied in an "even more offensive" way to Negroes' constitutional rights, since all white high school students are automatically

assigned initially to the white high school regardless of residence or level of academic achievement, with no assignment criteria being applied to them, whereas Negro high school students who live nearer the Negro high school are required to go there and those living nearer the white high school are not permitted to attend it unless they perform satisfactorily on scholastic aptitude and intelligence tests. Because, however, a significant start toward desegregation had been made, and many of the assignments of Negro children to white schools have been made on the initiative of the school authorities, the officials insist that the present method of pupil assignment is only temporary and they intend to comply with the law, and the district court judge retained the case on the docket so that he may re-examine the situation before the beginning of the next school year, the court affirmed the decision below, expressing confidence that steps would be taken promptly to end present discriminatory practices in the administration of the desegregation plan.

Before SOBELOFF, Chief Judge, and SOPER and BOREMAN, Circuit Judges.

Ten Negro pupils attending public schools in the City of Charlottesville, Virginia, prosecute this appeal from the action of the District Court sustaining the School Board's denial of their applications for enrollment in white schools of that city. The appellants also seek judicial re-examination of the desegregation plan presently in effect in Charlottesville.

A brief account of the progress of desegregation in Charlottesville would be helpful before discussing the merits of the instant appeal. The District Court, in 1956, enjoined the Charlottesville School Board from using a racial basis to regulate or affect the admission or enrollment of Negro children in any public school operated by the Board. This court affirmed the decree, *School Board of City of Charlottesville, Va. v. Allen*, 4 Cir., 1956, 240 F.2d 59, certiorari denied *School Bd. of Arlington County v. Thompson*, 1957, 353 U.S. 910, 77 S.Ct. 667, 1 L.Ed.2d 664, and we expressly stated that school assignments must not be based on race or color, 240 F.2d at page 64. Then, in September, 1958, the District Judge ordered ten Negro pupils to be assigned to Venable School, a previously all white elementary school, and two to Lane, the city's previously all white high school. However, the twelve Negroes did not attend, as those two schools were closed on September 22, 1958, by the Governor, in accordance with state laws requiring the closing of any school that became integrated. These laws were declared unconstitutional on January 19, 1959, by both state and federal courts. See *Harrison v. Day*, 1959, 200 Va. 439, 106 S.E.2d 636, and *James v. Almond*, D.C.E.D.Va. 1959, 170 F.Supp. 331.

Thereupon the School Board applied to this court for a stay of Judge Paul's order of September, 1958, so that it could prepare and sub-

mit to the District Court a plan for desegregation the Charlottesville public schools. The Board also agreed to furnish the twelve plaintiffs in that case whatever tutoring would be necessary to prepare them for admission to white schools in the coming school year. Under these conditions, this court granted a stay. See *School Board of City of Charlottesville v. Allen*, 4 Cir., 1959, 263 F.2d 295.

On February 18, 1959, the School Board adopted and put into effect what it designated as a "plan of desegregation." It was therein explicitly stated that "[no] pupil shall be denied admission to any public school of this city on the ground of race or color * * *." For elementary school purposes, the plan divided the city into six geographical zones, each served by one of the city's six elementary schools.¹ A child living in a particular zone would attend the school located in that zone and serving it, except that the school superintendent could assign a child to a school in another district if the pupil and his parents indicated such a preference and if the superintendent found that such assignment was in the pupil's best academic interests.

The city maintains two public high schools, Lane and Burley. Prior to the desegregation plan, Lane had been an all white school and Burley all Negro.² Under the plan, no geographical districts were created for the high schools. The only criteria established by the plan for the assignment of high school students were that the superintendent might consider the prefer-

1. The six elementary schools are: Jefferson, Venable, Johnson, Burnley Moran, Clark and McGuffey.
2. The Burley school, although located within the City of Charlottesville, was and still is supported and controlled in part by the adjoining County of Albemarle. However, neither side has suggested that this has any legal significance with respect to the issues of this case.

ence of the pupil and his parents, and should be guided by the pupil-teacher ratio in the schools, convenience of attendance and academic qualifications.

The plan went on to provide that upon the assignment of any pupil to a school his parents could request a transfer to another school, and in acting on such request the superintendent should take into account the pupil's residence, academic qualifications, personal desires, his needs for particular courses, the enrollment at the various schools, their available teaching personnel and physical facilities, "and other lawful and objective considerations." Finally, the plan provided that: "The superintendent may adopt such administrative procedures as he may think advisable to further the purposes of this plan so long as they are applicable to white and Negro pupils alike and to the same extent in the case of one as in the case of the other * * *."

Since the adoption of the plan, and under it, there has been some progress towards desegregating the city's schools. Although the actual number of Negroes attending previously all white schools has been relatively small, a significant start has been made. For the 1959-1960 school year, nine Negro elementary school pupils were assigned to Venable, a previously all white school, and three Negroes were assigned to Lane, the previously white high school. For the 1960-1961 year, three Negroes were assigned to the first grade at Venable, one of the three having been one of those assigned there the previous year but who failed to be promoted. Five other Negro children who had been assigned to Venable the preceding year were again assigned there. In addition, five Negro pupils who had previously been attending the Jefferson school, the colored elementary school, were granted transfers to Venable. Also, for the 1960-1961 year, three Negroes who were in Lane High School the previous year were re-assigned there, two other Negro students were initially assigned to Lane, and two applications for transfer from Burley to Lane were granted.

Turning now to the ten appellants, they are all students whose applications for assignment to all white or predominantly white schools were rejected by the superintendent. Four of them attend elementary schools and six are high school pupils. All four elementary school children had been and are now enrolled in the Jefferson school which is still attended exclusively by Negroes. They all reside in the

district served by Jefferson. However, two sought to transfer to Johnson Elementary School, attended solely by white children, and two attempted to transfer to Venable, attended predominantly by whites. Their applications for transfer were denied because of their residence in the Jefferson district. The applications of four of the appellants for enrollment in Lane, the high school attended predominantly by whites, rather than Burley which is still attended exclusively by Negroes, were denied because of academic qualifications. As to these four, the record reveals that their level of academic achievement, based upon the Iowa Silent Reading Test and the California Test of Mental Maturity, was substantially below the average of the pupils attending Lane High School. The remaining two appellants were denied assignment to Lane because they resided much closer to Burley.

In *Jones v. School Board of City of Alexandria*, 4 Cir., 1960, 278 F.2d 72, this court expressly recognized that residence and academic attainment tests may be applied in determining what schools children shall attend, provided that factors of race and color are not considered. In the case now before us, six of the appellants, as we have seen, were assigned to the appropriate schools based upon their residence, and the remaining four undoubtedly have academic deficiencies. In the absence of some otherwise discriminatory application of these criteria, they would appear to have no cause for complaint. Moreover, the desegregation plan on its face is not objectionable on constitutional grounds since it provides a reasonable procedure without consideration of race or color by which school assignments are to be regulated.

However, the record reveals serious constitutional infirmities in the manner in which the plan is being administered. In some respects, in fact, the school authorities are applying the plan directly contrary to its express provisions.

At the elementary school level, the plan contemplates that every child, regardless of race, shall be sent initially to the school of the district in which he lives, and after such initial assignments, there may be transfers if the parents so request and the superintendent approves. This is a perfectly acceptable method of making school assignments, as long as the granting of transfers is not done on a racially discriminatory basis or to continue indefinitely an unlawful segregated school system. However, in administer-

ing the plan, the school authorities are departing from this contemplated arrangement. Negro pupils residing in the Jefferson district are initially assigned to the Jefferson school. They are not permitted to transfer to one of the other schools. Similarly, white pupils living in one of the other five districts are initially assigned to the school of their residence district, and likewise are not permitted to transfer. So far, except for not permitting transfers, this is in accordance with the plan and would seem to be constitutionally permissible. But, Negro pupils living in one of the five districts other than Jefferson are not, as are whites, initially assigned to the school of their district but to Jefferson. To attend the school where they reside, these students must then apply for transfers—a procedure to which whites are not subjected. Also, white children living in the Jefferson district are not initially assigned to Jefferson, as Negroes living there would be, but go directly to one of the other schools. To attend Jefferson, they also would have to make application for transfers. This administration of the plan, which appears to contradict its express provisions, cannot indefinitely continue.

The cases have without exception condemned assignment systems where criteria are not applied equally to whites and Negroes in the same situation. See, e. g.: *School Board of the City of Charlottesville, Va. v. Allen*, 4 Cir., 1956, 240 F.2d 59; *Hamm v. County School Board of Arlington County, Va.*, 4 Cir., 1959, 264 F.2d 945; *Mannings v. Board of Public Instruction*, 5 Cir., 1960, 277 F.2d 370; *Jones v. School Board of City of Alexandria, Virginia*, 4 Cir., 1960, 278 F.2d 72; *Hill v. School Board of City of Norfolk, Virginia*, 4 Cir., 1960, 282 F.2d 473. In the instant case, the residence criterion is not being so applied. Negroes living in the Jefferson district must attend the school of that district whereas whites are initially assigned elsewhere. Negroes living in one of the other five districts are automatically assigned to Jefferson and must apply for transfer to the schools serving their residence zones, but whites in one of these zones automatically are assigned to the schools in their respective zones. There can be no question that these practices are forbidden by the Fourteenth Amendment to the Constitution of the United States.

In respect to the assignment of students to high schools, the application of the plan is even more offensive to the constitutional rights of

Negroes. All white students are automatically assigned initially to Lane High School, regardless of their place of residence or level of academic achievement. All white public high school students in the city presently attend Lane. Absolutely no assignment criteria are applied to them. On the other hand, residence and academic achievement criteria are applied to Negro high school pupils. As the plan is presently administered, if a colored child lives closer to Burley than to Lane, he must attend Burley High School. Moreover, even if a Negro student does live closer to Lane, he may not be permitted to attend it unless he performs satisfactorily on scholastic aptitude and intelligence tests—a hurdle white students are not called upon to overcome.

Such administration of public school assignments is patently discriminatory. As pointed out previously, the law does not permit applying assignment criteria to Negroes and not to whites. We recently stated in *Jones v. School Board of City of Alexandria, Virginia*, 4 Cir., 1960, 278 F.2d 72, 77, speaking of the criteria of residence and academic preparedness:

"On the other hand, these criteria could be used in such a way as to be a vehicle for frustrating the constitutional requirement laid down by the Supreme Court. If this is later shown to be the case, then the action of the School Board would not escape the condemnation of the courts. *If the criteria should be applied only to Negroes seeking transfer or enrollment in particular schools and not to white children, then the use of the criteria could not be sustained.* Or, if the criteria are, in the future, applied only to applications for "transfer and not to applications for initial enrollment by children not previously attending the city's school system, then such action would also be subject to attack on constitutional grounds, for by reason of the existing segregation pattern it will be Negro children, primarily, who seek transfers." (Emphasis supplied).

Because of the unconstitutional application of the assignment criteria, as clearly revealed by this record, we would normally be required to reverse. However, the Charlottesville school authorities have not attempted to defend the present method of assigning pupils as a permanent assignment system. They insist that it is

not a pupil assignment plan meant to continue indefinitely but rather a plan by which they intend in good faith to achieve as promptly as possible the desegregation of their schools, as required by law. As pointed out above, a significant start in this direction has been made. In addition, a large proportion of the assignments of Negro children to previously all white schools has been made on the initiative of the school authorities themselves. We recognize that they have made a genuine effort to begin desegregation.

Moreover, the able and conscientious District Judge was entirely aware of the infirmities in the present application of the criteria. During the course of the trial, he pointed out that they were not being applied equally to white and Negro children and that this was a deprivation of the constitutional rights of the Negro pupils. He gave weight, however, to the fact that the school authorities had evidenced an intention to comply with the law and expressed his hope that this course would continue. The Judge retained the case on the docket for such future action as may be necessary. He will be able to

re-examine the situation prior to the opening of the schools in the coming year.

In light of these factors, and as the particular assignment procedures were designed to be temporary measures only, we will at this time affirm the decision of the District Court. The action we take is based on the particular history and circumstances associated with this case. In appeals involving school desegregation problems, where the Supreme Court has permitted a period of transition for the desegregation of schools, each case is to some extent dependent on its own particular facts. The attitude of particular school authorities, their past conduct, the progress they have been making, the varying administrative difficulties that may be shown to exist in different localities, the court's view as to the officials' future intentions, and other factors must be taken into consideration. In the instant case we are confident that steps will be taken promptly to end the present discriminatory practices in the administration of the desegregation plan.

Affirmed.

EDUCATION

Private Schools—New Jersey

HOWARD SAVINGS INSTITUTE OF NEWARK, NEW JERSEY, Executor v. Florence PEEP, The Trustees of Amherst College, et al.

Supreme Court of New Jersey, April 10, 1961, 170 A.2d 39.

SUMMARY: An executor of a will filed a complaint in the New Jersey superior court, chancery division, requesting construction of certain provisions thereof and instructions directing the administration of the estate. By the provisions in question, the testator gave Amherst College funds "to be held in trust to be used as a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts." In view of a charter provision that "no student shall be . . . denied any of the privileges . . . of said College, on account of the religious opinions he may entertain," Amherst College decline to accept the funds unless the restrictive religious conditions were removed. On the basis of evidence that testator was a loyal supporter of Amherst (his alma mater), was not especially identified with any religious tenets or discriminatory principles, and had declined to include a gift over provision in the trust should Amherst not accept it as offered, the court concluded that testator was "completely satisfied to leave his purposeful charity singularly entrusted to the trusteeship of Amherst" and that that was his "ultimate desire," whereas the insertion of words "Protestant" and "Gentile" was not paramount for his creative intent. The executor was therefore directed to turn the funds over to the college "to function in all other respects as will accord with the re-

maintaining terms and conditions of said trust." 5 Race Rel. L. Rep. 387 (1960). On appeal, the state supreme court affirmed. After reviewing evidence intrinsic and extrinsic to the will, the court concluded that the lower court "properly found that the testator had a general charitable intent in the sense that he would have preferred to retain the charitable bequest—though in modified form—rather than leave the money to his cousins," and that he was more interested in benefitting Amherst and its needy students than he was in Protestantism. It was concluded that to award the funds to an educational institution willing to enforce the Protestant-Gentile restriction would contravene his primary purpose. The court found that it would be impracticable to appoint a substituted trustee to administer the fund for Amherst students, because Amherst had indicated it could not cooperate in the administration of the trust if the benefits are confined to Protestant-Gentile students. Also rejected was the contention that to allow Amherst to accept the funds under modified terms would violate the rule that a trustee cannot by his own act produce changed conditions which frustrate the donor's intention and still claim the gift. The court emphasized that the refusal of Amherst to accept the trust with the restriction was not merely to serve trustee convenience but was prompted by the charter provision against religious discrimination. It was therefore held that, rather than the bequest failing and the funds passing to the next of kin, the testator's intent would be effectuated as nearly as possible by striking out the Protestant-Gentile restriction and turning over the funds to Amherst to be administered according to the remaining terms of the trust. One justice dissented.

PROCTOR, Justice.

This appeal and cross appeal from a judgment of the Chancery Division primarily involve the question of whether that court properly applied the doctrine of *cy pres* to the terms of a trust established by the will of C. Edward McKinney, Jr., Mr. McKinney, a resident of the City of East Orange, died on October 21, 1957. His will, admitted to probate by the Surrogate of Essex County on November 6, 1957, designates the plaintiff, the Howard Savings Institution, as executor and provides in part as follows:

"Thirtieth: I give and bequeath the sum of Fifty Thousand Dollars (\$50,000) to Amherst College, an institution of learning, situate at Amherst, Massachusetts, to be held in trust to be used as a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts. (It being my thought that if a young man has enough funds to allow the waste of smoking, he certainly does not need help.) The money loaned from said fund is to be repaid to the fund at the earliest moment so that others may benefit from its use.

.....

"Thirty-third: All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind of whatsoever situate, of which I shall die seized or pos-

sessed, I give, devise and bequeath unto Amherst College aforesaid to be held on the same trusts as mentioned in paragraph Thirtieth aforesaid."

The charter of Amherst College provides that "no student shall be refused admission to, or denied any of the privileges, honors, or degrees of said College, on account of the religious opinions he may entertain." On June 7, 1958 the Board of Trustees of Amherst College adopted a resolution stating that it believed acceptance of a trust discriminating among students on religious grounds would contravene the letter and spirit of the charter and the policy of the college. Accordingly, the Board declined to accept the trust funds unless the Protestant-Gentile restriction was eliminated from the terms of the trust. Plaintiff-executor thereupon instituted this action to obtain judicial construction of paragraphs Thirty and Thirty-three of Mr. McKinney's will and conformable instructions. It joined as defendants the Board of Trustees of Amherst, the Attorney General of New Jersey, and the next-of-kin of the testator.

The Chancery Division, applying the doctrine of *cy pres*, entered a judgment excluding the words "Protestant" and "Gentile" from paragraph Thirty of the will and ordering the executor to turn the trust funds over to Amherst to be administered in accordance with the remaining terms and conditions of the will. 61 N.J. Super. 119, 160 A.2d 177 (1960). We certified the appeal of the executor and the cross appeal of the

next-of-kin before argument in the Appellate Division.

At the outset, the Board of Trustees of Amherst disputes the executor's standing to appeal. In a sense the Board's argument is moot, since all parties concede that the next-of-kin have standing to cross-appeal, and to resolve the issues raised by the next-of-kin we must consider whether, as the executor argues, the Chancery Division should have appointed a substituted trustee. Nevertheless, the argument raises a point of law which should be resolved for the future guidance of the bench and bar.

Only a party aggrieved by a judgment may appeal therefrom. *Green v. Blackwell*, 32 N.J.Eq. 768 (E. & A. 1880); *In re Atlantic City*, 3 N.J. Super. 62, 65 A.2d 552 (App.Div.1949). It is the general rule that to be aggrieved a party must have a personal or pecuniary interest or property right adversely affected by the judgment in question. *In re Lent*, 142 N.J.Eq.21, 59 A.2d 7 (E. & A. 1948); *Eugster v. Eugster*, 89 N.J.Eq. 531, 104 A. 135 (E. & A. 1918); *Swackhamer v. Kline's Administrator*, 25 N.J.Eq. 503, 505 (Prerog. 1874). The board argues that the executor has no interest in its own right which is adversely affected because it will be fully protected in making distribution as directed by the judgment of the Chancery Division, and that it has no representational interest because all other affected persons are adequately represented in the action—the next-of-kin by their counsel and the only other possible interests by the Attorney General.

An executor has the duty to see that the estate is distributed in accordance with what he believes are the wishes of the testator. Pursuant to that duty, he may in appropriate circumstances ask a court to construe the will. But there is no reason why the executor should be bound by the decision of a lower court if it believes that that court's decision will not accurately effectuate the testator's intent. As expressed by the New York Appellate Division: "the fact they [the executors] asked for a construction does not bind them to accept any construction they get, right or wrong." *In re Smith's Will*, 9 A.D.2d 583, 584, 189 N.Y.S.2d 331, 332 (App.Div. 1959). We think that under the circumstances the executor is entitled to a definitive judgment by an appellate court, and we therefore hold that it has standing to prosecute this appeal as the representative of the testator. See *Drewen v. Bank of Manhattan Co. of City of N. Y.*, 31 N.J. 110,

155 A.2d 529 (1959); 7 New Jersey Practice, Clapp, Wills & Administration § 981, p. 585 (1950).

The executor has standing to prosecute this appeal for an additional reason. The interests of Protestant-Gentile boys who might qualify for a scholarship loan under the terms of the trust have been diluted or adversely affected by the judgment below. Neither the next-of-kin nor the board represent those interests; for both have taken a position contrary thereto. The board argues that all unknown persons who might benefit under the trust are represented by the Attorney General. This is an unrealistic assertion. The Attorney General represents the public interest in a charitable trust rather than a particular class of potential beneficiaries. Indeed, in the present case, the Attorney General did not adopt any position as to how the doctrine of *cy pres* should be applied, and declined to appeal from the judgment below on the ground that the general charitable interest and the divergent views with regard to that interest are adequately represented by the other counsel. Since Protestant-Gentile boys who might qualify for loan aid have been adversely affected by the judgment below and would otherwise be unheard, the executor may appeal on their behalf. See *Green v. Blackwell*, supra.

This brings us to the merits of the case. No one urges on this appeal that the Protestant-Gentile restriction or its enforcement by the court offends public policy or the Fourteenth Amendment to the Federal Constitution. Hence, we have no occasion to express a view as to those issues. See Clark, "Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard," 66 Yale L.J. 979 (1957); Miller, "Racial Discrimination and Private Schools," 41 Minn.L. Rev. 145 (1957).

We first consider whether the Chancery Division, should have applied the doctrine of *cy pres* to the terms of the trust. The doctrine of *cy pres* is a judicial mechanism for the preservation of a charitable trust when accomplishment of the particular purpose of the trust becomes impossible, impracticable or illegal. In such a situation if the settlor manifested an intent to devote the trust to a charitable purpose more general than the frustrated purpose, a court, instead of allowing the trust to fail, will apply the trust funds to a charitable purpose as nearly as possible to the particular purpose of the settlor. *Wilber v. Owens*, 2 N.J. 167, 177,

65 A.2d 843 (1949); Restatement, Trusts § 399 (1935). Three observations about the doctrine may aid analysis of its applicability to the facts of the present case. First, the term "general charitable intent" ordinarily used by courts articulating the doctrine does not require an intention to benefit charity generally. It requires only a charitable purpose which is broader than the particular purpose the effectuation of which is impossible, impracticable or illegal. Sheridan & Delaney, *The Cy-Pres Doctrine* (1959); Restatement, Trusts & § 399, comment c, p. 1211 (1935). Second, the inquiry "did the settlor manifest a general charitable intent" is just another way of asking "would he have wanted the trust funds devoted to a like charitable purpose, or would he have wanted them withdrawn from charitable channels." 4 Scott, Trusts § 399, p. 2824 (1956). So stated, it can be seen that *cy pres* is an intent-enforcing doctrine. But it is well to keep in mind that it is a surmise rather than an actual intent which the courts enforce through application of the doctrine. Rarely does a settlor contemplate the possible nonfulfillment of his precise purpose. Therefore, the court must make an educated guess based on the trust instrument and relevant extrinsic evidence as to what he would have intended had he been aware of the contingency which has frustrated the exact effectuation of his expressed intent. 2A Bogert, Trusts & Trustees § 436, p. 344 (1953). And third, recognizing the social benefit deriving from the devotion of property to charitable purposes, courts ascertaining a settlor's surmised intent are guided by the policy of preserving charitable trusts whenever possible and by the established presumption against partial intestacy. *Mirinda v. King*, 11 N.J. Super, 165, 173, 78 A.2d 98 (App.Div.1951) and cases cited therein. See Comment, "Revaluation of Cy Pres," 49 Yale L.J. 303 (1939).

Similar to, but distinct from, *cy pres* is the doctrine of deviation from the terms of a trust. Applicable to private as well as charitable trusts, the doctrine of deviation comes into play when compliance with an administrative provision of the trust is impossible, illegal or in conflict with the essential purpose of the trust. Bogert, op. cit. supra, § 561 (2d ed.1960); 2 Scott, op. cit. supra, § 167; Restatement, Trusts § 167 (1935). In such a situation, a court, pursuant to its general equity power, may allow modification of the provision. The doctrine is commonly applied, for example, to appoint a substituted trustee when

the trustee designated by the settlor cannot or will not serve. E. g., *Martin v. Haycock*, 140 N.J.Eq. 450, 55 A.2d 60 (Ch.1947). Essential to application of the doctrine of deviation is a finding that the term of the trust to be deviated from is an administrative one—that is, that it is not essential to fulfillment of the settlor's scheme. See *Martin v. Haycock*, supra. This finding, in turn, depends on an interpretation of the settlor's intent. Ultimately, therefore, applicability of the doctrine of deviation, like the doctrine of *cy pres*, depends on what the court concludes the settlor would have wanted to happen if he were aware of the contingency which has made the exact effectuation of his expressed intent impossible.

With the above principles in mind, we return to the question of whether the Chancery Division should have disposed of the trust funds in the present case as it did.

We first consider the next-of-kin's contention that the doctrines of *cy pres* and deviation are inapplicable to the trust established by Mr. McKinney's will and that therefore the Chancery Division should have declared an intestacy. The next-of-kin's initial argument is that the bequest provided for in paragraphs Thirty and Thirty-three is not a charitable trust. They do not quarrel with the well-settled proposition that a trust for the advancement of learning is charitable. *Wilber v. Owens*, supra, 2 N.J. at p. 174, 65 A.2d at p. 846; *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N.J.Eq. 652, 665, 61 A. 1027, 3 L.R.A., N.S., 227 (E. & A. 1905). Instead, they rely on the rule that to be characterized as charitable, a trust, regardless of its purpose, must encompass a sufficient number of beneficiaries to warrant a community interest. 4 Scott, op. cit. supra, § 375. In order to qualify for scholarship loan aid under Mr. McKinney's will, an Amherst student must be an American born Protestant-Gentile, not given to gambling, smoking, drinking or similar conduct. The next-of-kin assert, and ask us to take judicial notice of, the fact that in light of contemporary social conditions and *mores*, few if any Amherst students could comply with all of the trust requirements. Paragraph Thirty is not so worded that an isolated indulgence in the proscribed activities would result in disqualification. The testator said that the beneficiaries are to be boys "not given to" smoking, drinking, etc. "Given to" is ordinarily defined as meaning "disposed; inclined; addicted; * * * as, given to drink." Webster's New Inter-

national Dictionary (2d ed.1959). It implies at least some degree of regular indulgence. This construction is confirmed by the testator's parenthetical observation: "It being my thought that if a young man has enough funds to allow the waste of smoking, he certainly does not need help." It is obvious that the testator had in mind a person who is so committed to the act of smoking that it becomes a financial drain. Presumably, there are and will be at Amherst enough American born Protestant-Gentiles who do not regularly smoke, drink, gamble or engage in similar conduct, and who thus fall within the class of potential beneficiaries to justify categorizing the trust as charitable. We think that there is a sufficiently broad classification combined with Mr. McKinney's worthy purpose to warrant that appellation. See Clark, *op. cit.* supra, at p. 998. In any event, we have no information which would merit our taking judicial notice to the contrary. Accordingly, we hold that paragraphs Thirty and Thirty-three of Mr. McKinney's will establish a charitable trust.

The next-of-kin also argue that the Chancery Division erred in applying the doctrine of *cy pres* because the testator had no general charitable intention. He had, they say, a particular, unitary and inseparable purpose of benefiting Protestant students at Amherst; he was equally interested in Protestantism and the college. Therefore, they contend, since the testator's intent cannot be effectuated exactly as expressed, the funds must pass by intestate succession.

As mentioned above, in ascertaining the existence of a general charitable intent the court must determine whether the testator would have wanted the trust funds to remain devoted to a charitable purpose similar to, but not the same as, he provided, or to go to his next-of-kin. For the answer, we must first look at the will. A provision for reverter or gift over upon failure of the particular trust purpose or the designation of heirs or other persons as residuary legatees may evidence absence of a general charitable intent. Cf. *Bankers Trust Co. v. N. Y., etc., Animals*, 23 N.J.Super. 170, 92 A.2d 820 (App.Div.1952); see also 6 New Jersey Practice, Clapp, Wills & Administration, § 275, p. 34 (1950). On the other hand, if there are no such provisions or if he has specifically provided for all his heirs and indicated that was all he wanted to bestow upon them, or if he has expressly declared he is not interested in his heirs, then it would seem that he had no desire to withdraw the trust funds

from charitable channels. Comment, 39 Yale L.J., *supra*, at p. 318.

The will in the present case strongly indicates that Mr. McKinney would not have wanted his next-of-kin to receive the trust funds. There is no provision in paragraphs Thirty and Thirty-three for reverter or a gift over if the trust bequest cannot be carried out in its exact terms. By contrast, the testator provided in paragraph Ninth of the will that if a trust bequest to the Town of Wolfeboro established therein could not be carried out in accordance with its exact terms, it should fail. A comparison of the charitable bequests to Amherst and the Town of Wolfeboro suggests a wholly different intent of the testator as to his willingness to accept some modification of their exact terms. If he had been opposed to any modification in the terms of the bequest to Amherst, it is reasonable to assume that he would have said so, just as he did in the Wolfeboro bequest. Additionally, we note that neither the next-of-kin nor other persons are designated as residuary legatees. Indeed, the residuary legatee is Amherst College under paragraph Thirty-three of the will. Moreover, the testator made specific legacies in varying amounts to twenty different persons, and did not include his next-of-kin. It is apparent from these detailed provisions that he executed his will after careful consideration and did not want his next-of-kin to share in his estate.

Evidence extrinsic to the will confirms the foregoing conclusion. The testator had no close relatives. He left no spouse or descendants or parents or brothers or sisters. His surviving kin are two cousins and a cousin of his mother. These persons lived distant from testator's home, and there is no evidence that he had any personal contact with them. Indeed, he expressly said that they were not to share in his estate. In a memorandum of instructions for the use of his scrivener in the preparation of the will the testator states in four separate places: "I have no immediate relatives, and any others omitted are either well-fixed financially or deliberately omitted for reasons very well known to themselves."

The aforementioned facts in and out of the will compel the conclusion that the Chancery Division properly found that the testator had a general charitable intent in the sense that he would have preferred to retain the charitable bequest—though in modified form—rather than leave the money to his cousins.

This brings us to the question of whether the Chancery Division correctly applied the doctrine of *cy pres*. First, we consider the executor's argument that the testator's intent can be fully effectuated by turning the funds over to another educational institution willing to honor the Protestant-Gentile restriction. This argument is based on the premise that the testator's intent was to benefit needy Protestant students, and that Amherst was designated trustee merely for administrative purposes. We think that the executor's argument is based on a faulty premise.

The very nature of the bequest indicates that the testator was interested in benefiting Amherst as well as the recipients of scholarship loans. A donor interested in benefiting only students presumably would make funds available to them regardless of what institution they wished to attend. But Mr. McKinney's will envisions as recipients only those students, who, meeting the other qualifications of the trust, are present or prospective members of the Amherst student body. A scholarship loan program, identified with a particular institution, inevitably benefits that institution by making available to it funds to attract and hold outstanding students. Cf. *Deubel v. Kervick*, 33 N.J. 568, 576, 166 A.2d 561 (1960). It is reasonable to conclude, therefore, that the creator of such a program intended to benefit the college identified therewith. That Mr. McKinney also intended to benefit the unknown student recipients of loans does not diminish at all his purpose of advancing the interests of Amherst. The foregoing shows, we think, that Amherst was designated trustee for more than mere administrative reasons. But this conclusion does not alone answer the executor's argument. Amherst will not accept the trust if it must enforce the Protestant-Gentile restriction. The question therefore is, would Mr. McKinney rather have the trust remain at Amherst with the restriction eliminated, or would he have preferred that the funds be turned over to another institution with the restriction? The facts indicate that Mr. McKinney was more interested in benefiting Amherst and its needy students than he was in Protestantism.

Mr. McKinney was a graduate of Amherst who continuously manifested an interest in the college. According to the records of contributions to the Alumni Fund which begin with the year 1932, the testator contributed to such funds in 1932 and every succeeding year until his death. In addition, he attended the 50th, 55th and 60th

reunions of his graduating class in 1946, 1951 and 1956 respectively. (Amherst College has no record of the attendance of members of his class at previous reunions.) On the other hand, there is no evidence in the record that testator was a church-goer or actively interested in any church activities. In his will he made a bequest of \$2,000 to the Board of Congregational Missions in memory of his father, who was born in Natal, and gave the Board the books in his home to be used in their Natal Mission. This modest bequest to the mission in memory of his father contrasts markedly with the sum left to Amherst (\$50,000) and the designation of Amherst as legatee of the residuary estate (about \$150,000). Additionally, the will contains no bequest to any church. Finally, the trust bequest is so worded that the Protestant-Gentile restriction is merely one of a series of qualifications to be met by recipients of scholarship loan aid. Accordingly, we conclude that Mr. McKinney's primary purpose was to advance the interests of Amherst by making available to it funds for needy students as well as to aid such students, and that to award the funds to another educational institution—if one could be found to enforce the Protestant-Gentile restriction—would contravene that purpose.

The executor further argues that Mr. McKinney's intent can be best effectuated by appointing a substituted trustee to administer the scholarship loan fund for Amherst students. We disagree because we find that it would be impracticable in the circumstances of this case to have a substituted trustee administer the trust for Amherst. In response to an inquiry from this court as to whether the college could cooperate with a substituted trustee, the Board of Trustees of Amherst adopted and forwarded to us, without objection from any party to this appeal, a resolution which states in pertinent part:

"the policy of Amherst College would be to avoid any involvement whatsoever in the administration of the trust in question. Specifically, the College would in no way participate in identifying, evaluating, or selecting persons who might be beneficiaries of the trust; the College would not use its facilities to publicize the trust or otherwise bring its existence to the attention of present or future students; the College would neither solicit nor serve as a depository of scholarship applications; the College would not refer its students or other persons to the trust administrator; the College would de-

cline to serve as an intermediary between the trust administrator and potential or actual candidates for benefits under the trust; the College would not at the behest of the trust administrator provide information concerning the scholastic achievement, character, or financial status of any student or applicant for admission. Upon a student's direct request, the College would provide information concerning that student, so far as that information may be readily available in the College's records and so far as its disclosure is consistent with general policies bearing upon confidentiality of the records. A person to whom financial aid has been granted by an outside organization, individual, or trustee would be neither advantaged nor disadvantaged in respect of his becoming or remaining a student at Amherst College."

It is clear from the above-cited resolution that Amherst believes it cannot under its charter cooperate in the admission of the trust if its benefits are confined to Protestant-Gentile students.

Without Amherst's cooperation the administration of this trust would be so impracticable as to defeat the general purpose of the testator. The substituted trustee would have to be a qualified educator with experience in the allocation of scholarship funds. Even if such a willing trustee could be found, the practical disadvantages are numerous. There would be no feasible way in which the scholarship fund could be used to aid students who are seeking to enter Amherst. Often, the availability of scholarship aid will affect the decision of a needy student to attend a particular college. It would be most difficult for a substituted trustee to know who was applying or considering applying for entrance to Amherst without the cooperation of the college. Thus a class of students and the college would be denied the benefit of what must have been one of the purposes of the trust. If the funds are made available only to matriculated students, the trustee would still face well-nigh insuperable obstacles. He would have to obtain detailed information about a scholarship applicant. Whether an applicant was being considered for other aid by the college, for example, would obviously be relevant to a decision to award him aid from the McKinney trust. Then, the award of a scholarship loan involves a delicate weighing of the financial needs of the applicant, his scholastic standing, and his development potential. More-

over, in providing a fund to aid "deserving" boys at Amherst, the testator manifested an essential reliance on the personal discretion of Amherst as trustee. For an applicant is "deserving" in a meaningful sense only in relation to the competency and worth of others who seek to enter or remain at the college. Surely Amherst would not violate the trust if it denied aid to a specific applicant or admitted student if it determined another applicant was more "deserving." Mr. McKinney, therefore, must have contemplated that the merits of loan applications be judged according to those relative standards which Amherst itself may establish to further its conception of what individuals are worthy of membership in its student body. We are unable to understand how any trustee without Amherst's cooperation can possibly make the comparative value judgment which Mr. McKinney had in mind. Finally, once an award is made, the trustee must have some policing mechanism to assure that the recipient continues to meet the trust qualifications. Determination of whether he deserved a loan renewal would realistically require access to college records and consultations with college instructors and administrators. The above factors clearly show that without the college's cooperation it would be impracticable, if not impossible, for a substituted trustee to administer the scholarship loan fund for Amherst students.

The executor argues that to apply *cy pres* because Amherst will not cooperate with a substituted trustee would be to allow the college by its own action to vary the testator's intent. It cites the rule that a trustee cannot by his own act produce changed conditions which frustrate the donor's intention and still claim the gift. But the cases so holding are distinguishable from the present case. Typical, is *Connecticut College v. United States*, 107 U.S.App.D.C. 245, 276 F.2d 491 (D.C.Cir. 1960). There a testatrix left funds for the construction of a memorial building in a particular location at the United States Military Academy. The Academy declined to erect the building at the proposed site because the location did not accord with its building-expansion program. Instead, it asked to be allowed to use the funds for the construction of a wing on an existing building. The trial judge applied *cy pres* and awarded the funds to the Academy. On appeal the judgment was reversed on the ground that *cy pres* cannot be used to vary the terms of a bequest "merely because the variation will meet the desire and suit the convenience of the trust-

tee." The Court of Appeals emphasized that the refusal of the Academy to apply the funds exactly as prescribed by the testator was not due to circumstances beyond the control of the Academy. In the present case, the refusal of Amherst to accept and administer the trust with the Protestant-Gentile restriction was not merely to serve trustee convenience. The refusal was prompted by the college charter which expressly prohibits the college from denying any privileges of the school to a student because of the religious opinion he may entertain. Clearly, scholarship loan aid is one of those privileges. It seems to us therefore that in the sense required for the application of *cy pres*, it is impossible for Amherst to accept and administer the trust exactly as desired by the testator. It is as equally clear that college cooperation in the administration of the trust by a substituted trustee would be an indirect violation of the college's charter.

In view of the fact that Mr. McKinney had a general charitable intent, we hold that the bequest does not fail and the funds do not pass to the next-of-kin. And, in view of the additional facts that Amherst conceives it to be inconsistent with its charter to administer or assist in the administration of the trust so long as its funds are available only to Protestants, and that it would be impracticable for a substituted trustee properly to administer the trust, we hold that the testator's intent can be effectuated as nearly as possible by striking the Protestant-Gentile restriction and turning the funds over to Amherst to be administered in accordance with the remaining terms and conditions of the trust. Of course, striking the Protestant-Gentile restriction does not mean that Protestant-Gentile students will be excluded as beneficiaries of the trust. Any Amherst students who meet the other qualifications set forth in the will will be eligible for scholarship loan aid. Accordingly, the judgment of the Chancery Division is affirmed.

For affirmance: Chief Justice WEINTRAUB and Justices JACOBS, FRANCIS, PROCTOR and HALL-5.

For reversal: Justice HANEMAN-1.

Dissent

HANEMAN, J. (dissenting).

I agree that the executor has a standing to prosecute this appeal and that the testator created a trust of charitable nature which should not fail because of the refusal of the designated

trustee to accept and carry out his express directions. I as well agree that the purpose of the testator was to provide scholarship loans for students of Amherst College. However, I conceive that the application of the *cy pres* doctrine to delete so much of testator's expressed objectives as are allegedly repugnant to the charter of the named corporate trustee is not here warranted. Instead, the court should appoint a substituted trustee to administer the trust in strict accordance with the directions of the testator. To that extent I dissent.

Cy pres has been called the theory of approximation and is applied only to prevent a charitable trust from failing. The phrase literally means "as near as." It is the principle under which courts save a charitable trust from failure by reason of the stated charitable objectives being or becoming impossible, impracticable or illegal of fulfillment. This result is accomplished through the instrumentality of carrying out the more general charitable purposes of the testator by substituting, for the object which would otherwise fail, another charitable object which is believed to approximate the originally stated purpose. 2A Bogert, Trusts and Trustees (1953), § 431; IV Scott on Trusts 2d, § 399 (1956); Restatement 2d, Trusts, § 399 (1959); *Mirinda v. King*, 11 N.J. Super. 165, 177, 78 A. 2d 98 (App. Div. 1951); *MacKenzie v. Trustees of Presbytery of Jersey City*, 87 N.J. Eq. 652, 672, 61 A. 1027, 3 L.R.A., N.S., 227 (E. & A. 1904).

Impossibility or impracticability of fulfillment may arise as a result of a variety of circumstances. We are here concerned with only one of such set of facts, i.e., whether the refusal of the designated corporate trustee to accept the administration of the trust, for the stated reason that the acceptance for the declared charitable objectives is repugnant to its charter, would cause a failure of the trust absent the interposition of the *cy pres* doctrine.

Only where the testator intended that the method of applying property to a charitable purpose should lie wholly and solely within the discretion of the named trustee will a trust fail upon the refusal or inability of such trustee to function. For such a resulting failure to occur the trustee must be an essential part of the testatorial scheme. Where property is left to a corporation for designated charitable purposes and the corporation is unwilling or unable to assume the administration for the designated purposes, the trust will not fail unless the gift to the cor-

poration was testator's primary or general intention. If the testator manifested his primary intention to devote the property to certain specific charitable purposes and the designation of a trustee was a secondary or particular object, the secondary object must be sacrificed to accomplish the primary object. The choice of the donee trustee then is not of the essence of the gift but merely incidental thereto. In *MacKenzie v. Trustees of Presbytery of Jersey City*, supra, the court said, at p. 674 of 67 N.J.Eq., at p. 1036 of 61 A.:

" . . . Where the testator or donor had two objects in view—one primary or general, and the other secondary or particular—and these are, literally speaking, incompatible, the particular object must be sacrificed in order that effect may be given to the general object, according to law, and 'as near as may be' to the testator's or donor's intention. Again, the principle may be more briefly stated as that of applying property, as nearly as possible, according to the donor's intentions, when those intentions cannot be exactly carried out."

And again, at p. 675 of 67 N.J.Eq., at p. 1037 of 61 A.:

" . . . The sound rule now is—at least in America—that courts will not execute charitable trusts in a manner different from that intended, unless the intent cannot in the original mode be literally carried out; that they will preserve the substance, although the mode be departed from, and that they will not presume or invent an intention which the testator or donor has not fairly indicated."

In *In re Young Women's Christian Ass'n*, 96 N.J.Eq. 568, at p. 574, 126 A. 610, at p. 612 (Ch. 1924), the court said:

"Where a testator has two objects in view, one primary or general and the other secondary or particular, and these are, literally speaking, incompatible, the secondary object must be sacrificed in order that effect may be given to the general object. Where the will exhibits an intention that the donation shall be devoted to a specific charitable purpose and prescribes a particular mode or means by which the purpose shall be carried out, the failure of the mode or means, after the donation has taken effect, will not defeat the charitable purpose."

IV Scott, supra, § 397.3 states:

"Where a testator devises or bequeaths property to a charitable corporation to be applied to a particular charitable purpose, it is to be inferred that the application of the property to the designated purpose is the testator's primary intention, and that the choice of the organization to make the application is secondary. In such a case the fact that the corporation named is unwilling or unable to accept the gift and to apply the property to the designated purpose does not cause the disposition to fail. Even though the gift is to a corporation for its general purposes, the disposition does not fail if the primary intention of the testator was that the property should be applied to those purposes, and the choice of the particular donee was merely incidental and not of the essence."

See also *Mirinda v. King*, supra; *Litcher v. Trust Co. of N. J.*, 18 N.J.Super. 101, 86 A.2d 601. (Ch.Div.1952), affirmed 11 N.J. 64, 93 A.2d 368 (1952); *Brown v. Condit*, 70 N.J.Eq. 440, 61 A. 1055 (Ch.1905); *Levin v. Attorney-General*, 136 N.J.Eq. 568, 42 A.2d 870 (Ch.1945); *Martin v. Haycock*, 140 N.J.Eq. 450, 55 A.2d 60 (Ch. 1947); *Restatement of the Law, Trusts*, supra, § 397, comment g; § 399, comment o; IV Scott, supra, § 397, § 397.3; *Bogert*, supra, § 438.

The line of demarcation between impossibility and impracticability is most difficult to draw. It is one of degree rather than of kind. IV Scott, supra, § 399.4; *Bogert*, supra, § 439.

"Impracticability" does not connote that the objects of the trust could be attained by some method of administration other than provided by the creator with greater facility or less trouble, but rather that to carry out the literal directions of the testator would, in effect, result in a failure to accomplish his general charitable intent, or in a frustration thereof. *Restatement of the Law, Trusts*, supra, § 399, comment q; cf. *St. James Church v. Wilson*, 82 N.J.Eq. 546, 89 A 519 (Ch.1913), affirmed sub nom. *West v. Rector, etc. of St. James Episcopal Church*, 83 N.J.Eq. 324, 91 A. 101 (E. & A. 1914); *MacKenzie v. Trustees of Presbytery of Jersey City*, supra; *Guaranty Trust Co. of N. Y. v. N. Y. Community Trust*, 139 N.J.Eq. 144, 50 A.2d 161 (Ch. 1946); *In re Young Women's Christian Ass'n*, 96 N.J.Eq. 568, 126 A. 610 (Ch.1924).

Related to but distinct from the *cy pres* doc-

trine is the doctrine of deviation which concerns the administrative provisions of a trust. Under this doctrine a trust will not fail for want of a trustee. IV Scott, *supra*, § 397, § 397.1; *Mirinda v. King*, *supra*; Restatement of the Law, Trusts, *supra*, § 388, § 397; *Martin v. Haycock*, *supra*. This is sometimes confused with the *cy pres* doctrine.

We should therefore proceed to analyze the McKinney will and the extrinsic testimony adduced in the light of the foregoing basic legal concepts, in order to determine whether the refusal by Amherst to serve as a trustee would normally cause a failure of the trust and hence warrant the invoking of the *cy pres* doctrine.

This is not a holographic will prepared by an unlettered layman but rather a will prepared for the testator by a member of the bar of this State. A perusal of the entire instrument demonstrates a complete familiarity with and intentional and apt use of technical expressions. The bequest here is not to Amherst for its general charitable purposes but rather, in classical language, to Amherst as trustee, for a specifically defined and restricted purpose. Where the testator intended an outright gift to a charitable foundation for its general charitable purposes he employed apt words to express that intent. Observe paragraph twenty-eighth of his will, which reads:

"I give and bequeath unto American Board of Congregational Foreign Missions, of Boston, Massachusetts, the sum of Two Thousand Dollars (\$2,000.) in memory of my father who was born at Amensomtote, Umlazi River, Natal, South Africa, Adams Mission."

And so, had testator intended either an outright gift to Amherst's general purposes or for student loans to any needy student, in Amherst's discretion, it would have been a simple matter for a member of the bar to express that intent. The fact that testator was an Amherst alumnus; had attended various class reunions; had contributed amounts varying from \$5 in 1932 to \$50 in 1947 to the Amherst College Alumni Fund served to prove only that he was interested in his *alma mater* and not in all needy students at Amherst. The bequest to the Board of Congregational Missions displays an interest in that Protestant church. The so-called modesty of the bequest does not detract from that conclusion. The absence of any further bequest to a church and of any evidence that he was a regular church at-

tendant or active in any church activities raised at best only an inference that he was not a regular church communicant, not that he was not a practicing and convinced Protestant. The totality of the facts fails to give rise to any legitimate inference that he was not primarily interested in student loans to the class described in his will, i. e., "Protestant, Gentile boys" rather than to any needy student at Amherst.

The description of the *cestuis que trust* is so exact that a substituted trustee could easily select persons meeting the qualifications. The element of discretion is reduced to a minimum. There is not exhibited either in the will or in the extrinsic testimony any evidence that such selection should lie wholly and solely in the discretion of Amherst. The testator's primary purpose was to create scholarship loans for a certain class of Amherst students. The appointment of Amherst College as a trustee was not an essential part of that scheme. Scholarship loans to designated Amherst students was of primary importance and the nomination of a trustee to select those students was of secondary importance. The designated trustee was a mere conduit through which the funds should flow to the specially qualified persons. The question is not whether some benefit will redound to Amherst but rather whether that benefit was of paramount interest to the testator. It does not follow that this indirect benefit was the testator's primary concern. Plainly, his principal concern was the rendering of financial aid and assistance to "Protestant Gentile boys" so that they might be in a position to take advantage of the cultural facilities furnished by Amherst and so obtain a rounded education. There can be no dispute with the conclusion that Amherst will benefit, in the broad connotation of that word, to some extent by the furnishing of funds to aid students in paying their tuition and thus attract those who might otherwise not attend that college. The trust does not make funds available to Amherst to assist it in discharging its corporate educational purposes by paying for plant, equipment or personnel. It follows that the benefit which will be received by Amherst is only incidental to and arises from the benefit which will be received by "Protestant Gentile" students.

There is a multitude of possible means for publicizing the existence and availability of this fund for scholarship loans to "deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking

or similar acts" attending Amherst College. A simple medium to employ would be the insertion of a paid advertisement in the college newspaper. After application by a student, the essential relevant information for qualification for such a loan could be obtained by the applicant from the college. As noted in the majority opinion, Amherst has signified its willingness to cooperate to the extent that "upon a student's direct request, the College would provide information concerning that student, so far as that information may be readily available in the College's records and so far as its disclosure is consistent with general policies bearing upon confidentiality of the records." Admittedly, Amherst could administer the fund with greater ease. This is not to say, however, that administration by a substituted trustee is either impossible or impracticable. For examples of cases in which trusts for the benefit of college students were administered by trustees other than the particu-

lar college at which such students were attending, see *Harrold v. First National Bank of Fort Worth*, 93 F.Supp. 882 (D.C.N.D. Texas 1950); *Hoyt v. Bliss*, 93 Conn. 344, 105 A. 699 (Sup.Ct. Err.1919); *Sessions v. Skelton*, 163 Ohio St. 409, 127 N.E.2d 378 (Sup.Ct.1955); *Speer v. Colbert*, 200 U.S. 130, 26 S.Ct. 201, 50 L.Ed. 403, 413 (1906); *Barnard v. Adams*, 58 F. 313 (C.C.N.D. Iowa 1893); *Field v. Drew Theological Seminary*, 41 F. 371 (C.C.D.Del. 1890). That scholarship grants and loans can be efficiently administered by trustees other than educational institutions is evidenced by the some 825 pages of descriptive matter contained in *Feingold, Scholarships, Fellowships and Loans* (1955), which catalogues such grants and loans from funds administered by other than academic trustees.

I would therefore reverse and remand with directions to the trial court to appoint a substituted trustee to administer the trust under the exact terms of the will.

CIVIL RIGHTS

Immunity—Federal Statutes

Willie SMITH v. Charles S. DOUGHERTY, et al.

United States Court of Appeals, Seventh Circuit, February 16, 1961, 286 F.2d 777.

SUMMARY: Two individuals filed an action under federal civil rights statutes in federal court, seeking \$650,000 damages from a criminal court judge, a state's attorney and two assistants, the sheriff, and two Chicago police officers. The complaint charged that defendants, acting in their official capacities, had deprived plaintiffs of their constitutional and civil rights in connection with an allegedly unconstitutional extradition to the state of Michigan to stand trial there on a robbery charge. The district court dismissed the complaint for failure to state a claim upon which relief might be granted. On appeal, the Court of Appeals for the Seventh Circuit affirmed, holding that the judge and the prosecuting attorneys are immune from civil liability for acts in the exercise of judicial functions; and that no action under the civil rights statutes lay against the sheriff as no purposeful and systematic discrimination against a class of persons of which plaintiffs were members had been shown. The court emphasized that the federal civil rights statutes were not enacted to discipline local law enforcement officials.

CIVIL RIGHTS**Scope—Federal Statutes****H. D. BUTLER v. O. B. ELLIS, Director, Texas Department of Corrections.**

United States District Court, Southern District, Texas, Houston Division, March 10, 1961, Civil Action No. 13,551, _____ F.Supp._____.

SUMMARY: A prisoner in a Texas state penal institution forwarded to a federal district court a complaint whereby he purported to sue, under federal civil rights statutes, the director of the state department of corrections. Damages of \$50,000 were sought. Plaintiff alleged that he has leg and hip ailments which prison doctors had not been successful in treating; that orthopedic specialists at a Galveston hospital had examined him and had related by letters to prison doctors their findings and recommendation that he be hospitalized in Galveston for corrective surgery; that though the prison medical department had requested defendant to submit the correspondence to the board of pardons and paroles so that an emergency medical reprieve could be obtained for plaintiff, defendant had withheld the letters; that such conduct by defendant is a willful refusal to allow plaintiff to obtain needed medical care and surgery and, in effect, equivalent to an unauthorized sentence compelling him to spend the remainder of his life in bed or to death as a result; and that defendant's failure to present the doctors' reports to the board violates the civil rights statutes. The court recognized federal decisions holding that a cause of action is stated under these statutes by a deliberate refusal by prison officials to furnish medical care to convicts, and other federal decisions holding that matters of internal prison discipline concerning food, solitary confinement, and the like are not to be interfered with by federal courts. It was held that plaintiff stated a cause of action, defendant's refusal to present the papers to the board being not merely an internal discipline matter. Although plaintiff had not been completely denied medical treatment at the prison, the court pointed out that allegedly he had been denied essential surgery since corrective orthopedic surgery was not made available to him at the prison. The court therefore granted plaintiff's motion to proceed in forma pauperis and directed the clerk to file his complaint.

CIVIL RIGHTS**Police Brutality—Federal Statutes****Webster HARDWICK, Jr. v. Bernard HURLEY, et al.**

United States Court of Appeals, Seventh Circuit, May 2, 1961, 289 F.2d 529.

SUMMARY: An individual brought an action in federal district court under the civil rights acts against Chicago police officers to recover damages for personal injuries caused by alleged beatings inflicted during an arrest. Plaintiff had been arrested while driving under the influence of alcohol and later refused to take a drunkometer test when the police ordered him to do so. Plaintiff alleged that the officers then beat him severely with the intent of punishing him for his refusal to incriminate himself by taking the test. The district court dismissed the complaint for failure to state a claim under the civil rights acts. The Seventh Circuit Court of Appeals reversed and remanded with directions to hold a trial on the merits. The court held that, since plaintiff had alleged that the beatings violated his Fourteenth Amendment due process right to refuse to incriminate himself, the complaint stated a cause of action under the Supreme Court's decision in *Monroe v. Pape*, 6 Race Rel. L. Rep. 16 (1961).

CIVIL RIGHTS**Survival of Action—Federal Statutes**

Mrs. Mary Ellen PRITCHARD v. Eugene G. SMITH, Chief of Police, City of Little Rock, Arkansas.

United States Court of Appeals, Eighth Circuit, April 26, 1961, 289 F.2d 153.

SUMMARY: An individual brought an action in federal district court under section 1983 of the federal civil rights statutes against the Little Rock, Arkansas, chief of police for damages to her person due to alleged beatings inflicted during an arrest. Defendant police chief died before trial, and his administrator moved to dismiss, arguing that the action could not survive defendant's death. The district court dismissed the suit, holding that federal law governed the survival of the action, and that the federal rule was that actions involving personal wrongs abate upon the defendant's death. [See companion case, *Lauderdale v. Smith*, 5 Race Rel. L. Rep. 1100 (1960)]. Plaintiff appealed to the Eighth Circuit Court of Appeals, urging that the action be revived and the administrator be substituted as defendant. Although agreeing that federal law controls, the court of appeals ruled that since no federal statute deals with the survival of such an action, section 1988 of the civil rights statutes applies so as to authorize resort to state law where it is not inconsistent with federal law. Finding that Arkansas law provides for the survival of actions for wrongs to the person after the defendant's death, the court reversed the judgment below and remanded with directions to reinstate the case.

CIVIL RIGHTS**Trial Procedure—Federal**

On March 7, 1961, the United States District Court for the Middle District of Alabama promulgated Local Rule No. 1 for the handling of civil rights cases in that court. It requires that each litigant in such cases must be represented by at least one local counsel who is regularly admitted to practice before the court, and who is personally aware of the various social and legal problems involved. The local counsel is required to be present and participate actively in all stages and phases of the litigation, specifically including enforcement proceedings.

The United States District Court for the Middle District of Alabama, being aware not only of the legal but of the social problems involved in the cases filed and prosecuted in this Court that have as their basis the alleged violations of civil and constitutional rights, is of the opinion that it is not in the public interest nor in the Court's interest for the Court to continue to permit litigants to employ or utilize counsel in this field of litigation when all parties are not actively represented by counsel that reside in this district, as has been the practice heretofore followed in some instances. This Court is of the further opinion that such a practice does not make for the proper and efficient administration of justice and tends to make this Court's burden

in this type of litigation more difficult in that assistance to the Court is not immediately and readily available from counsel actively participating in and fully cognizant of all aspects of said cases.

In consideration of the above, this Court, as authorized by law, hereby promulgates, adopts and ORDERS the following rule:

In all proceedings filed in this Court wherein there is an allegation or allegations that a citizen of the United States is being deprived of civil and/or constitutional rights guaranteed by the Constitution and/or laws of the United States, each litigant must have at least one legal representative of record who permanently resides in this district and is regularly admitted to practice

before this Court, and who during all phases of the litigation should be personally aware of the various social and/or legal problems involved and will be fully informed as to all aspects of the litigation, and who has authority to speak for his client and will be readily available to the Court for assistance, counsel and advice. Said local counsel in all such cases, including the United States Attorney for the Middle District of Alabama when said litigation concerns actions by or against the United States, shall appear and actively participate during all stages and phases

of said litigation, including any proceedings deemed necessary by the Court to enforce its orders, decrees and judgments.

The Clerk of this Court shall file the original of this local rule with the other rules and general orders of this Court and shall forward a certified copy of the same to the United States Attorney for this district and to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, Washington, D. C.

Frank M. Johnson, Jr.
United States District Judge

CONSTITUTIONAL LAW

Religious Freedom, Access to Courts—California

In re FERGUSON, et al., on Habeas Corpus.

Supreme Court of California In Bank, April 24, 1961, 361 P.2d 417, 12 Cal. Rptr. 753.

SUMMARY: Ten inmates of a California state prison, members of the "Muslim Religious Group", filed in the state supreme court a petition for a writ of habeas corpus, seeking to be freed from restrictions placed on their religious activities while in prison and on their right to communicate with their attorney. An order to show cause issued, and counsel was appointed to represent petitioners. According to the court's findings, petitioners believe in the "solidarity and supremacy of the dark-skinned races, that integration of white and dark races is impossible since contrary to the laws of God and nature", and that they should not submit to the authority of prison officials because they should kneel to no one but their "own God." It was found that since 1958 the state Department of Corrections had refused to accord the privileges of a religious group or sect to the Muslims in prison, and, accordingly, petitioners were not allowed a place of worship, their meetings were broken up, they were not allowed to discuss their doctrines, a major portion of their literature had been confiscated, and their religious leaders were not allowed to visit them in prison. The court held that petitioners' rights to religious freedom under the state constitution had not been denied, because the legislature had properly delegated to administrative officials the power to regulate penal institutions, and the regulations restricting Muslim religious activity were reasonable, in view of the threat these prisoners posed to the maintenance of order in the crowded prison environment. Further, the court held that the restrictions upon petitioners did not amount to such extreme mistreatment as to warrant the application of federal constitutional doctrines in interference with rules reasonably necessary to the orderly conduct of the state prison. The physical force applied to petitioners and their segregation to an old part of the prison was found to have been prompted by the necessities of prison discipline rather than having been visited on them because of their status as Muslims. However, the court ruled that the conduct of prison officials in refusing to deliver to an attorney addressee petitioners' correspondence relative to legal representation in the instant proceedings was an abuse of discretion in that communication seeking legal assistance is an important part of a prisoner's right to prompt and timely access to the courts; but since counsel had been appointed for petitioners and communication to him had not been unduly restrained, the court held the latter question was moot.

WHITE, Justice.

This is a petition in *propria persona* for a writ of habeas corpus by Jesse L. Ferguson and nine other inmates confined in Folsom State Prison pursuant to judgments, the validity of which are not herein questioned. The petition principally seeks the removal of restrictions placed upon petitioners' claimed religious activities in prison, and the right to communicate with an attorney concerning alleged illegal restraints by the prison officials, unrelated to the judgments of incarceration. Our order to show cause issued, and counsel was appointed to represent petitioners before this court.

According to their allegations, petitioners are members of the Muslim Religious Group. They believe in the solidarity and supremacy of the dark-skinned races, and that integration of white and dark races is impossible since contrary to the laws of God and nature. They appear to be strongly convinced of the truth of their form of what they characterize as a religious belief and in its superiority over other religions. Concerning their relationship to the prison officials, petitioners state that "It is a maxim Dogma and order of our God that we kneel to no one except him. Because we as a religious group do not kneel before some one [who] does not believe in our God."

The general policy of the Department of Corrections is to encourage religious activities by inmates. Sometime prior to February 1958, the Director of Corrections considered the question of whether the Muslims should be classified as a religious group. It was determined that they were not entitled to be accorded the privileges of a religious group or sect at that time. Such is the present policy of the Department of Corrections toward Muslims, and this policy was approved by the State Advisory Committee on Institutional Religion in January 1961. Other religious groups are allowed to pursue religious activities, but the Muslims are not allowed to engage in their claimed religious practices.

There appears to be considerable friction between the prison officials and the Muslim inmates as individuals and as a group. On August 16, 1960, two prison officials found it necessary to search two Muslim inmates for contraband. The officials were soon surrounded by approximately 20 of the Muslim group, who manifested much hostility and a desire to protect their two "Brothers" from interference by the prison of-

ficials. A number of the Muslims who had gathered were ordered to report to the Captain's office where they were questioned. According to the report of a prison official, "All of those questioned looked down their noses at those present as if we were a very small piece of refuse." At the close of the interview, petitioner Mitchell refused to leave and as an officer attempted to remove him, Mitchell told him "to get his 'stinking hands' off him as no white devil was allowed to put his hands on a Muslim." Mitchell was forced to the floor so he could be handcuffed and removed from the office. Petitioner Johnson thereafter lunged at one of the officers, and he was also forcibly subdued and removed from the Captain's office.

On August 21, 1960, petitioner Ferguson attempted to contact a Los Angeles attorney concerning alleged violations of the rights of the Muslim inmates while in Folsom prison, but it appears that the letter was not allowed to be transmitted to the attorney. Ferguson again sought help on August 28, 1960 by writing to his mother, with directions to take the letter to a specified address. The letter to his mother was also confiscated, and Ferguson was punished for abuse of the mail privilege. In the opinion of the prison officials the letter to his mother contained derogatory remarks about the prison officials. Ferguson stated in the letter to his mother that the prison officials had advised him that his letter to the attorney "Is being returned in your central file, and he is [not] an approved correspondent of yours and you will not be permitted to write to him. The charges you state in your letter are also untrue and we will not permit you to make such statements, criticizing officials of this institution." Ferguson continued: "Now mother what this man forgot, was that this letter I wrote to Mr. Berry. It was legal and he is a lawyer. And I have the right by law to write to a lawyer when it is about law."

It is alleged that in October 1960 and on three subsequent occasions, petitioner Hayes attempted to purchase the "Muslim Bible," the "Holy Qur'an." He was advised that the book had been disapproved by the associate warden, and he was told to refrain from persisting in his efforts to obtain a book that could not be approved. It also appears that a major portion of the Muslim religious literature has been confiscated by prison authorities. Specifically, it appears that on October 10, 1960, petitioner Ferguson's Muslim religious scrapbook was confiscated by the prison

officials when it was found in the possession of inmate Jones. Jones, who is not a petitioner, would not disclose the ownership of the scrapbook, and it was subsequently destroyed as contraband. In his report of the incident the correctional officer stated that "This book consisted of the usual 'Muslim' trash, advocating hatred of the white race, superiority of the black man, * * *."

On November 1, 1960, petitioner Ferguson refused to obey an order given by a prison official. He then grabbed the official by the wrist and necktie, and subsequently he became abusive and belligerent toward other officers in refusing to submit to a routine search of his person. It was necessary to physically subdue him in order to accomplish the search.

Penal Code, section 1473 provides that "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Penal Code, section 1484 provides that "The party brought before the Court or Judge, on the return of the writ, may * * * allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge." And section 1485 of the Penal Code provides that "If no legal cause is shown for such imprisonment or restraint, or for the continuation thereof, such Court or Judge must discharge such party from the custody or restraint under which he is held." Concerning Penal Code, section 1473, the court stated in *In re Rider*, 50 Cal.App. 797, 801, 195 P. 965, 966, that "We think that a person may be said to be unlawfully 'restrained of his liberty,' so as to be entitled to the writ of *habeas corpus*, when, though [lawfully] in custody, he is deprived of some right to which, even in his confinement, he is lawfully entitled under the Constitution or laws of this state or the United States, the deprivation whereof serves to make his imprisonment more onerous than the law allows, or curtails, to a greater extent than the law permits even in his confinement, his freedom to go when and where he likes." We stated in *In re Chessman*, 44 Cal.2d 1, 9, 279 P.2d 24, 29, that "The writ of habeas corpus has been allowed to one lawfully in custody as a means of enforcing rights to which, in his confinement, he is entitled." It thus appears that a writ of habeas corpus may be sought to inquire into alleged illegal restraints upon a prisoner's activities

which are not related to the validity of the judgment or judgments of incarceration, but which relate "solely to a matter of prison administration." *In re Chessman*, supra, 44 Cal.2d 1, 3-4, 5-6, 9, 279 P.2d 24, 26.

Petitioners contend that their rights to religious freedom under the Fourteenth Amendment of the United States Constitution, and that their rights to "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, * * *" under article I, section 4, of the California Constitution, have been denied by the prison officials. They allege that they are not allowed a place to worship, that their religious meetings are broken up, often by force, that they are not allowed to discuss their religious doctrines, that they are not allowed to possess an adequate amount of their religious literature, and that their religious leaders are not allowed to visit them in prison. They allege that Protestant, Catholic, Jewish and Christian Scientist groups are allowed the above enumerated privileges. Petitioners seek to be permitted religious privileges equal to those allowed to the other prison religious groups, or that religious privileges be denied to all prison religious groups of whatever faith, or, that they be discharged from prison so they may pursue the beliefs and practices of their Muslim faith.

Respondent admits that the above restrictions have been enforced only against the petitioners and other Muslim inmates, but claims that the discriminatory treatment is justified because: "In the petitioners' case, the Director determined that the principles petitioners allegedly espoused were in direct conflict with the health, safety, welfare and morals of the prison. * * * Petitioners, by their acts in rejecting the authority of members of the white race, displaying verbally and physically their hostility to the prison staff, interfering in the disciplinary proceedings of other inmates and the alleged doctrines advocated, present a problem in prison discipline and management."

Freedom of religion is protected as a fundamental right by provisions in the California and United States Constitutions. U.S. Const. Amends. XIV, 1; Cal. Const. art. I, sec. 4. But whatever may be the guarantees of general religious freedom afforded by article I, section 4 of the California Constitution, it is expressly provided in article X, section 7 of that document that "Notwithstanding anything contained elsewhere in this Constitution, the Legislature may provide

for the establishment, government, charge and superintendence of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and superintendence of such institutions to any public governmental agency, or * * * officers, * * * Any of such * * * officers * * * shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe." (Emphasis added.) It is manifest that petitioners are not protected by the guarantees of religious freedom set forth in article I, section 4 of the California Constitution, since they are incarcerated in an institution for "persons convicted of felonies," and subject to the above exception of article X, section 7. Nor does it appear that petitioners may rely on federal constitutional guarantees since, of necessity, inmates of state prisons may not be allowed to assert the usual federal constitutional rights guaranteed to non-incarcerated citizens. *United States ex rel. Morris v. Radio Station WENR*, 7 Cir., 209 F.2d 105, 107; see *Siegel v. Ragen*, 7 Cir., 180 F.2d 785, 788; *Nichols v. McGee*, D.C., 169 F. Supp. 721, 724-725; *Curtis v. Jacques*, D.C., 130 F. Supp. 920, 921-923. Rather, the United States Supreme Court has recognized that: "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356; see also, *Tabor v. Hardwick*, 5 Cir., 224 F.2d 526, 529. It has been indicated that in cases of extreme mistreatment by prison officials, an inmate of a state prison may obtain relief on federal constitutional grounds. *United States ex rel. Morris v. Radio Station WENR*, supra, 7 Cir., 209 F.2d 105, 107; *Adams v. Ellis*, 5 Cir., 197 F.2d 483, 485. But in the instant circumstances, the refusal to allow these petitioners to pursue their requested religious activities does not appear to amount to such extreme mistreatment, so as to warrant the application of whatever federal constitutional guarantees which may exist for the protection of inmates in state prisons. Cf. *United States ex rel. Wagner v. Ragen*, 7 Cir., 213 F.2d 294, 295; *Nichols v. McGee*, supra, D.C., 169 F. Supp. 721, 724-725. We are, accordingly, reluctant to apply federal constitutional doctrines to state prison rules reasonably necessary to the orderly conduct of the state institution. *United States ex rel. Morris v. Radio Station WENR*,

supra, 7 Cir., 209 F.2d 105, 107; *United States ex rel. Vraniak v. Randolph*, D.C., 161 F. Supp. 553, 559-560.

The California Legislature has implemented the constitutional prison control provisions of article X, section 7, by providing that the "management and control of the State prisons" is vested in the Office of the Director of Corrections. Pen. Code, sec. 5054. Further, Penal Code, section 5058 provides that "The director may prescribe rules and regulations for the administration of the prisons and may change them at his pleasure." It appears that the alleged discrimination against petitioners and the Muslim group respecting their religious activities has occurred pursuant to an order by the Director of Corrections. Notwithstanding the foregoing grant of authority, the orders, rules, or regulations prescribed by the Director of Corrections must be reasonable and not an abuse of his discretion. See *In re Chessman*, supra, 44 Cal.2d 1, 9, 279 P.2d 24; *Davis v. Superior Court*, 175 Cal. App.2d 8, 20, 345 P.2d 513. However, it is apparent that the Muslim beliefs in black supremacy, and their reluctance to yield to any authority exercised by "some one [who] does not believe in [their] God," present a serious threat to the maintenance of order in a crowded prison environment. Even conceding the Muslims to be a religious group it cannot be said under the circumstances here presented that the Director of Corrections has made an unreasonable determination in refusing to allow petitioners the opportunity to pursue their claimed religious activities while in prison. See *Akamine v. Murphy*, 108 Cal.App.2d 294, 296, 238 P.2d 606.

Petitioners' counsel contends that the instant determination by this court is "of necessity, a forerunner to determination of the broader question of whether the preachments of the 'Black Muslims' are such that their activities could be suppressed *outside* of prison." It is further contended that if the Muslim beliefs are such as to justify prohibition of mere assembly within prison of the holders of those beliefs, then a corresponding assembly outside of prison could be suppressed. But it is apparent, in view of the provisions of article X, section 7, of our Constitution that the instant determination relates only to the Muslim Religious Group in prison.

It was contended at oral argument herein that petitioners are only seeking freedom of religious belief, and not the freedom to effectuate their beliefs by action. Even as prisoners, petitioners have the absolute right to possess their Muslim

beliefs. Cf. *Gospel Army v. City of Los Angeles*, 27 Cal.2d 232, 242, 163 P.2d 704; *Ex parte Jentzsch*, 112 Cal. 468, 471, 44 P. 803, 32 L.R.A. 664. Nor may petitioners be punished for holding their Muslim beliefs. Cf. *Everson v. Board of Education*, 330 U.S. 1, 15-16, 67 S.Ct. 504, 91 L.Ed. 711. But assembling and discussing the inflammatory Muslim doctrines in a prison situation must be considered to be such action, even though "religious," which may be reasonably regulated by the Director of Corrections. Cal. Const. art. X, sec. 7; Pen.Code, secs. 5054, 5058; cf. Cal.Const. art. I, sec. 4 which reads in part, ["but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."].

It has also been contended on petitioners' behalf that numerous incidents wherein petitioners and other Muslims have been involved in violations of prison rules have been directly caused by the prison officials' refusal to accord the Muslims the status of a religious group, and that if the Muslims were accorded the same privileges as other religious groups in prison, the cause of the friction would be removed. While there may be merit in this contention, nevertheless, in light of the potentially serious dangers to the established prison society presented by the Muslim beliefs and actions, it cannot be said that the present, suppressive approach by the Director of Corrections is an abuse of his discretionary power to manage our prison system. What adjustments should be made to alleviate the present situation would appear to be, at this time, a matter within his discretion (see Pen.Code, § 5058; *Akamine v. Murphy*, supra, 108 Cal.App.2d 294, 296, 238 P.2d 606.)

Petitioners contend that they have been subjected to physical force by prison officials solely because of their affiliation with the Muslim movement. They allege that force has been used (1) August 16, 1960, upon the person of petitioner Mitchell, "without just cause," (2) August 16, 1960, upon petitioner Johnson, "without just and proper cause," and (3) November 1, 1960, an assault upon petitioner Ferguson "without any just cause whatsoever." Petitioners also allege that they have been segregated by the prison officials into an old and filthy part of Folsom prison. It is admitted in the return that physical force was used on each of the above occasions, but the respondent warden alleges that the physical force used on each occasion

was only that necessary to subdue one or another of the petitioners when he refused to obey proper orders and became violent. It is also admitted that the petitioners were segregated, but only in the normal course of institutional punishment for their violations of prison regulations.

Prisoners may not be subjected to corporal punishment (Pen.Code, sec. 673) nor, as indicated, may petitioners be punished solely because of their Muslim beliefs. But physical force may be used by prison officials where necessary to prevent a prisoner from doing bodily harm to a prison official. *O'Brien v. Olson*, 42 Cal. App.2d 449, 460, 109 P.2d 8. It appears that in each of the enumerated instances where physical force was used, one of the petitioners, because of a conflict involving his Muslim beliefs, became physically belligerent and aggressive toward a supervisory official. Since by their aggressiveness petitioners appear to have created a serious risk of physical harm to the prison officials who had charge of them, the use of physical force by the officials in each of the above enumerated instances was within the rule of *O'Brien*, supra, so that petitioners have not been subjected to physical force solely because of their Muslim beliefs. It also appears that the segregation of the Muslim petitioners was in the ordinary course of institutional discipline. See *People v. Garmon*, 177 Cal.App.2d 301, 303, 2 Cal.Rptr. 60. Furthermore, this court must assume that the prison officials will treat the Muslim inmates as humanely as is possible, considering the difficult administrative problems presented by the Muslim actions and practices. Code Civ.Proc. § 1963, subs. 1, 15, 33.

Petitioner Ferguson requests specially that the prison officials be compelled to return his religious scrapbook, which he loaned to inmate Jones from whom it was confiscated on October 10, 1960. Since we have determined that the Muslim Religious Group is not entitled as of right to be allowed to practice their religious beliefs in prison, the "religious" scrapbook must be considered as any ordinary writing advocating or encouraging prohibited conduct. Reasonable censorship of the printed matter which may be possessed by an inmate is necessary in prison administration (see Pen.Code, § 4570), and is not a denial of fundamental rights. *People v. Ray*, 181 Cal.App.2d 64, 69, 5 Cal.Rptr. 113; *Morris v. Igoe*, 7 Cir., 209 F.2d 108, 109; *Adams v. Ellis*, supra, 5 Cir., 197 F.2d 483, 485. In view of the inflammatory nature of the material

which petitioner Ferguson's scrapbook appears to have contained, it cannot be said that the confiscation of the scrapbook by the prison authorities was unreasonable. See *Davis v. Superior Court*, supra, 175 Cal.App.2d 8, 20, 345 P.2d 513.

Petitioners particularly urge that the prison authorities be specifically ordered and directed to allow the former to purchase their bible, the Holy Koran. But, as we shall see, it does not appear that they seek the standard Mohammedan scriptures.

As heretofore pointed out, reasonable censorship of the printed matter which may be in the possession of an inmate is necessary in prison regulation and does not impinge upon fundamental rights. Also, we have heretofore set forth the broad delegation of power by our Constitution and statutes which provide that the "management and control of the State prisons" is committed to the office of the Director of Corrections (Pen.Code, § 5054), and the director may not only formulate rules and regulations for the administration of prisons, but, at his pleasure, he may change them. Pen.Code, § 5058. Certainly it cannot be said that the prison officials would be acting arbitrarily or unreasonably in withholding a version of any bible or other literature adapted by the Muslim Religious Group to support their doctrines of the supremacy of the black race and segregation from the white race. To so hold would be to compel the prison officials to permit inmates to purchase and disseminate in the prison literature advocating and encouraging the very conduct which the prison authorities may lawfully suppress.

In the case now engaging our attention, the record does not establish that petitioners seek to be permitted to purchase the orthodox Holy Koran, recognized as the scriptures of the Mohammedans and containing the professed revelations to Mohammed, and which is the basis for the religious, social, civil, commercial, military and legal regulations of the Mohammedan world. Nor does it appear that in the requests to the prison officials for permission to purchase their bible, petitioners made it clear to those officials that they were seeking to purchase the orthodox Holy Koran, rather than some version adapted to their "Black Muslim" doctrines. Manifestly then, respondent prison authorities cannot be herein directed to comply with petitioners' request to purchase their sacred book when it has not been established that a

proper application has been made to the prison authorities thereby enabling them to exercise their discretionary power to manage the prison system. Pen.Code, §§ 5054, 5058.

Petitioner Ferguson contends that he has an absolute right to contact a member of the Bar on proper legal business, and that by withholding his communication to the attorney of August 21, 1960, the prison officials in effect held him incommunicado as to any effective vindication of his legal rights. Apparently Ferguson was then attempting to secure counsel to represent him and his fellow Muslims in the prosecution of the instant matter. Respondent does not deny that the foregoing letter to the attorney was not allowed to be delivered, but it is contended that "the sending and receiving of correspondence within the prison is a privilege and not a right; * * * that inmates may write to * * * attorneys, provided each letter is of proper character and length; that a violation of the rules regarding mail privilege may cause curtailment or suspension of this privilege; * * *." It was further urged by respondent at the oral argument that as a prisoner, petitioner Ferguson is generally permitted to contact or procure an attorney by use of the mails, but that no prisoner is allowed to set forth in such a letter to an attorney anything derogatory or critical of the prison authorities. It appears that at this time petitioners, including Ferguson, have communicated with, and had the benefit of appointed counsel through action of this court. Respondent now asserts the right to refuse to permit any of the petitioners, as prisoners, to procure by mail counsel of his own choosing if the letter to the attorney contains matter which is derogatory of the prison authorities.

Even though incarceration in a state prison brings about the loss of numerous legal rights (Pen.Code, §§ 2600, 2601), and the necessary curtailment of freedoms because of incarceration (*Davis v. Superior Court*, supra, 175 Cal.App.2d 8, 20, 345 P.2d 513), a prisoner remains "under the protection of the law." Pen.Code, § 2650. He may not be subjected to "cruel, corporal or unusual punishment" (Pen.Code, § 673; *O'Brien v. Olson*, supra, 42 Cal.App.2d 449, 460, 109 P.2d 8), "and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced." Pen.Code, § 2650. Also, the money and valuables which a prisoner brings into prison must be accounted for upon his discharge. Pen.Code, § 2085. Further-

more, a prisoner has a right not to be treated unreasonably considering the circumstances. *Akamine v. Murphy*, supra, 108 Cal.App.2d 294, 296, 238 P.2d 606; see *People v. Garmon*, supra, 177 Cal.App.2d 301, 303, 2 Cal.Rptr. 60; *Davis v. Superior Court*, supra, 175 Cal.App.2d 8, 19-20, 345 P.2d 513.

We stated in *In re Chessman*, supra, 44 Cal.2d 1, 10, 279 P.2d 24, 29, that "prisoners have the right to prompt and timely access to the mails for the purpose of transmitting to the courts statements of facts which attempt to show any ground for relief, * * *" and it has been held, as hereinbefore indicated, that a person who is lawfully incarcerated may prosecute a writ of habeas corpus to inquire into a matter which "relates solely to a matter of prison administration." *In re Chessman*, supra, 44 Cal.2d 1, 3-4, 5-6, 9, 279, P.2d 24, 26. It would thus appear only right and just that a prisoner has a right to prompt and timely access by mail to the courts (*In re Chessman*, supra, 44 Cal.2d 1, 10, 279 P.2d 24; *Warfield v. Raymond*, 195 Md. 711, 713, 71 A.2d 870, 871; see *Ex parte Hull*, 312 U.S. 546, 548-549, 61 S.Ct. 640, 85 L.Ed. 1034; *Spires v. Dowd*, 7 Cir., 271 F.2d 659, 661; *Haines v. Castle*, 7 Cir. 226 F.2d 591, 593) though as stated in *In re Chessman*, supra, 44 Cal.2d 1, 10, 279 P.2d 24, 29, "it would be manifestly impossible to allow prisoners 'immediate access by mail to the courts * * * at all times.'"

It has been held that the right of prison officials to inspect communications between prisoners and their attorneys "should not be used unnecessarily to delay communications to attorneys or the courts since such delay could amount to an effective denial of a prisoner's right to access to the courts." *Bailleaux v. Holmes*, D.C., 177 F.Supp. 361, 364. It has also been recently stated that "Of course an absolute isolation of those incarcerated in a penal institution by a ban on communication by them with the outside population would constitute an unreasonable exercise of that power [censorship]." *Davis v. Superior Court*, supra, 175 Cal.App.2d 8, 20, 345 P.2d 513, 521. Further, it is manifest that the right of a prisoner to petition a court for redress of alleged illegal restraints on his liberty is unreasonably eroded if the prison authorities may be allowed to deny a prisoner the opportunity of procuring counsel, so that his petition for writ of habeas corpus or other mode of redress always must be presented in propria persona. It must

also be conceded that when a prisoner is writing to an attorney in an attempt to secure legal representation, he must be allowed to set forth factual matters even though derogatory or critical of the prison authorities, since he must persuade the attorney receiving the letter that the writer's rights as a prisoner truly have been violated, so as to interest that attorney in the prisoner's alleged case against the prison authorities. Therefore, it is an abuse of discretion for prison regulations to be utilized so as to deny an inmate the opportunity to procure with reasonable promptness, or to communicate with in a reasonably prompt manner, a member of the Bar on matters pertaining to alleged violations of the prisoner's legal rights allegedly suffered as a direct result of incarceration, even though the letter to the attorney may be critical of the prison authorities.¹ (Cf. *In re Chessman*, supra, 44 Cal.2d 1, 3-4, 9-10, 279 P.2d 24; *People v. Howard*, 166 Cal.App.2d 638, 642-643, 334 P.2d 105 [Prison rules cannot be used to impair an inmate's right to appeal]; *In re Robinson*, 112 Cal.App.2d 626, 629-630, 246 P.2d 982 [Absolute right of inmate to file document with a court relating to judgment of conviction]; *In re Rider*, supra, 50 Cal.App. 797, 801-802, 195 P.965 [Superintendent of institution of incarceration may not deny inmate right to privately consult with counsel].)

While the question of the right to engage counsel for the purpose of this proceeding now appears to be moot in that counsel has been appointed and presumably communication to him has not been unduly restrained, this is not to say that these petitioners may henceforth be restrained from communicating, by letter or otherwise, to prospective counsel written in good faith concerning claimed infringements on their legal rights, such as they are.

In view of the foregoing, the petitioners are

1. The instant holding is not contrary to *In re Chessman*, supra, 44 Cal.2d 1, 9, where it was held that a prisoner has no right to be visited by an attorney who is not his attorney of record. The object of *Petitioner Ferguson's* communication was to secure the services of an attorney. Nor is the instant holding contrary to *Chessman*, supra, 44 Cal.2d at page 10, 279 P.2d 24, where it was held that a prisoner has no enforceable right to engage in legal research. The latter holding in *Chessman* was supported by a reference to Penal Code, sections 2600, 2601, and 2602, which sections deprive persons sentenced to a state prison of their civil rights. It is manifest that Penal Code, sections 673, 2650, 2085, and 1473, all of which sections provide legal rights to a prisoner, are exceptions to the general rules of sections 2600, 2601, and 2602, supra.

not now entitled to relief in any respect complained of in the petition. Accordingly, the order to show cause is discharged, and the petition for the writ is denied.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS and DOOLING, JJ., concur.

CRIMINAL LAW

Breach of Peace—Mississippi

STATE v. FARMER

Municipal Court of the City of Jackson, Mississippi, May 26, 1961.

[See 6 Race Rel. L. Rep. 544, *infra*].

CRIMINAL LAW

Extradition—New York

PEOPLE of the State of New York on the relation of Walter M. CAVERS, Relator, v. Randolph B. GRASHEIM, Deputy Warden, etc., Respondent.

New York Supreme Court, Special Term, Queens County, Part II, April 19, 1961, 214 N.Y.S.2d 936.

SUMMARY: A South Carolina Negro sought to sustain a writ of habeas corpus granted by the county court of Queens County, New York, to prevent his extradition to South Carolina. Relator had been convicted of reckless homicide in South Carolina, the conviction was affirmed by that state's supreme court, and certiorari denied by the United States Supreme Court. During the appeals, relator had posted bond and gone to New York. When he did not return to South Carolina, that state sought extradition, but relator obtained a writ of habeas corpus. In the New York Supreme Court he argued that the South Carolina conviction was improper and that he had been discriminated against in that trial because of his race. The New York court dismissed the writ of habeas corpus, holding that when the formal requisites of extradition upon a conviction had been met, the courts of New York could not consider the factual unfairness of the conviction. Excerpts from the opinion are printed below.

J. IRWIN SHAPIRO, Justice.

The State of South Carolina seeks to extradite the relator. He has obtained a writ of habeas corpus and the issues arising upon the return of that writ are here for determination.

The relator, a minister, formerly resided in Charlotte, North Carolina and pastored a church in York, South Carolina for more than 25 years.

Prior to March 18, 1958, he had led an exemplary life, had never been convicted of a crime, and had been active as an integrationist and in other causes on behalf of the National Association for the Advancement of Colored People.

On March 18, 1958, the relator was operating an automobile in the City of York, State of South Carolina and while doing so it collided at an intersection with an automobile being driven by one William S. Dickson, a white resident of York, South Carolina. Mr. Dickson, a man 80 years old was instantly killed.

The relator was arrested and thereafter tried upon an indictment charging him with murder and reckless homicide.

Petitioner was found guilty of "reckless homicide" and was sentenced to serve three years in the South Carolina penitentiary.

The relator appealed to the South Carolina

Supreme Court where he contended, by an assignment of error, that "the testimony concerning speed of his automobile violated the South Carolina rule concerning such evidence since none of the witnesses identified the Relator as the driver of the car which they claimed they had seen and none of them identified the car as the one involved in the accident."

These and other contentions of the relator were rejected by the South Carolina Supreme Court as being without merit. As a consequence his conviction was affirmed. *State v. Cavers*, 114 S.E.2d 401.

Upon a petition for a rehearing, relator contended that the receipt of evidence contrary to the State Supreme Court's rule violated the relator's right of due process of law, protected by the Fourteenth Amendment to the United States Constitution.

The petition for rehearing was denied by the South Carolina Supreme Court on May 21, 1960.

The relator thereupon made application for a stay of sentence and a stay of remittitur, in order to apply for a Writ of Certiorari to the Supreme Court of the United States.

On or about the 4th day of December 1958 and at the time the relator served his notice of appeal, from the judgment of conviction, to the South Carolina Supreme Court, he was required to and did post an appearance bond in the amount of \$5,000. One Harvey Maners was the surety on the bond.

At the time the South Carolina Supreme Court denied the relator's application for a rehearing in May of 1960, the relator was in the State of New York attending a church convention. He has since then failed to present himself to the appropriate South Carolina authorities to begin serving the sentence imposed upon him, but has elected to remain in this State.

A petition for a Writ of Certiorari to the United States Supreme Court was filed with that Court on August 22, 1960. It was denied on November 7, 1960. *Cavers v. State of South Carolina*, 364 U.S. 886, 81 S.Ct. 176, 5 L.Ed.2d 106.

The relator was arrested in this State at the request of the South Carolina authorities on January 11, 1961, eight months after the South Carolina Supreme Court had affirmed his conviction and approximately two months after the United States Supreme Court had denied his petition for a Writ of Certiorari.

The relator appeared in the Magistrates' Court of the City of New York on January 12, 1961, at which time the case was adjourned to the next day and at that time was further adjourned to February 3, 1961.

On February 3, 1961, the Magistrate transferred the matter to the County Court of Queens County, where the relator was advised of his right to return voluntarily to the State of South Carolina or to apply for a writ of habeas corpus. He thereupon sued out the writ which initiated this proceeding.

In the Magistrates' Court there were present not only the relator and his attorney but a Sheriff from South Carolina and his deputy. In the "Sheriff's Party" was Harvey Maners, the surety on relator's appearance bond. The "Sheriff's Party" followed the relator to the Queens County Court House where the relator appeared pursuant to the direction of the Magistrates' Court. The hearing in the County Court was thereupon adjourned.

Upon leaving the court room, the relator and his counsel conferred with Harvey Maners, at which time the relator was informed by Maners in the presence of counsel *that if the relator (Cavers) could raise \$5,000 to exonerate the bond, that the entire matter would be dropped.* He also allegedly said that it was he, Maners, who was interested in the relator's return to the State of South Carolina and not the State itself. A tentative agreement was worked out and the parties dispersed. Apparently, by reason of certain incidents which thereafter occurred and which are not germane to this proceeding, nothing further was done in connection with the proposed agreement.

The relator now seeks to sustain the Writ of Habeas Corpus obtained by him contending:

"(1) No crime was in fact committed in the State of South Carolina.

"(2) That he is a fugitive from injustice rather than a fugitive from justice.

"(3) That the State of South Carolina is in fact not acting in good faith, (and) that this is an attempt to return the Relator to the State of South Carolina to satisfy a bail bond, a private claim and debt."

To support his contention "no crime was in fact committed in the State of South Carolina" relator urges "that the State of South Carolina did not have the right or power to proceed under a statute which clearly required a showing of

recklessness and also to rely on a common law remedy requiring only a show of negligence in the event that the proof is insufficient to support a verdict under the statute." He further argues that the trial Court also erred when it did not require "the State to elect between the common law and the statutory charge" by reason of which "it was impossible for the Relator to know the standard which was applied to his acts."

This point is palpably without merit. The relator has been found guilty by a jury; that verdict was permitted to stand by the trial judge, and the judgment of conviction entered thereon was affirmed by the Supreme Court in the State of South Carolina, which upon an application for a re-hearing adhered to its affirmance. In addition, as has been noted, certiorari was refused by the United States Supreme Court.

Under such circumstances, this Court is foreclosed from inquiring into the propriety of the rulings made on the trial in the demanding State. Every one of the fifty States in these United States, being a sovereign power, has a right, within constitutional limitations, to formulate and adopt its own rules of procedure and evidence. Whether in any case a trial Court has committed error is for the Appellate Court of that particular State to determine (or if a Federal Constitution question be involved, for the United States Supreme Court), but no Court in another State may sit as a reviewing tribunal. Code of Criminal Procedure, § 849; *People ex rel. Samet v. Kennedy*, 285 App.Div. 1116, 140 N.Y.S.2d 466.

Once it is made to appear here (1) that the person sought to be returned is a fugitive from justice, (2) that a demand in due form has been made for his return and, (3) that he is either charged with an extraditable crime in the demanding State or has already been convicted of such a crime therein, this Court may not embark upon any further inquiries. It is then constitutionally required to surrender him to the demanding State and it may not interfere with his return by the summary process of habeas corpus, upon speculation as to what will be or what should have been the result of a trial in the place where the Constitution provides for its taking place. *People ex rel. Higley v. Mills-paw*, 281 N.Y. 441, 444, 24 N.E.2d 117; *Drew v. Thaw*, 235 U.S. 432, 35 S.Ct. 137, 59 L.Ed. 302; *People ex rel. Shurburt v. Noble*, 4 A.D. 2d 649,

169 N.Y. S.2d 181; *People ex rel. Fong v. Honeck*, 253 N.Y. 536, 171 N.E. 771.

In the *Higley* case, *supra*, the Court said (281 N.Y. at page 445, 24 N.E. 2d at page 120):

"There may be determined in this proceeding questions as to (1) whether the papers upon which the warrant was issued by the Governor of the asylum State are sufficient, (2) whether the indictment charges a crime under the laws of the State seeking the extradition, (3) whether the crime was committed in the demanding State under its laws, (4) whether the accused, was in the demanding State on the day when the crime is alleged to have been committed, (5) the identity of the alleged fugitive, (6) whether the person sought to be extradited is a fugitive from justice (*People ex rel. Corkran v. Hyatt*, 172 N.Y. 176, 64 N.E. 825, 60 L.R.A. 774; *Roberts v. Reilly*, 116 U.S. 80, 95 S.Ct. 291, 29 L.Ed. 544; *Pettibone v. Nichols*, 203 U.S. 192, 27 S.Ct. 111, 51 L.Ed. 148; *Hogan v. O'Neill*, 255 U.S. 52, 56, 41 S.Ct. 222, 65 L. Ed. 497; *People ex rel. Plumley v. Higgins*, 109 Misc. 328, 178 N.Y.S. 728). We may not consider the question of the sufficiency of the indictment as a pleading (*Hogan v. O'Neill*, *supra*) nor the possibilities resulting from the trial (*Drew v. Thaw*, 235 U.S. 432, 35 S.Ct. 137, 59 L.Ed. 302) nor the merits of the defense to the indictment or the motive and purpose of the extradition proceedings (*Drew v. Thaw*, *supra*; *Smith v. Gross*, 5 Cir., 2 Fed. Rep. 2d 507, Certiorari denied 267 U.S. 610, 45 S.Ct. 355, 69 L.Ed. 813; *Matter of Bloch*, D.C., 87 Fed.Rep. 981; *Commonwealth v. Superintendent*, 220 Pa. 401, 69 A. 916, 21 L.R.A., N.S., 939; *Edmunds v. Griffin*, 177 Iowa 389, 156 N.W. 353)." (Italics ours.)

In another and similar case, *People ex rel. Kaufmann v. O'Brien*, 197 Misc. 1019, 96 N.Y. S.2d 401, 402, the Court said:

"This is a summary proceeding. We are not and cannot be concerned in this matter with the innocence or guilt of the relator."

In *People ex rel. Reid v. Warden of City Prison*, Sup., 63 N.Y.S.2d 620, 623, the Relator had been convicted in the State of Florida. While he was serving his term in prison he

escaped and came to the State of New York where he was arrested as a fugitive from the State of Florida. There, as here, the relator was a Negro "and the argument was made that negroes are grossly discriminated against in Florida and other southern states" and that therefore this State should not order his return to a jurisdiction where he would not be treated fairly. In answering that contention, and dismissing the writ of habeas corpus, the Court said:

"Obviously, the denial of a fair and impartial trial is reversible error on appeal which is the regular and proper method of presenting that question for review. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; *Smith v. State of Texas*, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84; *Chambers et al. v. State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; *Canty v. State of Alabama*, 309 U.S. 629, 60 S.Ct. 612, 84 L.Ed. 988; *White v. State of Texas*, 309 U.S. 631, 60 S.Ct. 706, 84 L.Ed. 989, also rehearing denied 310 U.S. 530, 60 S.Ct. 1032, 84 L.Ed. 1342. These cases of the United States Supreme Court each presented a question involving the due process clause of the Federal Constitution and it would seem that in each instance judgment was reversed and the cause was remanded for further proceedings to the court of original jurisdiction.

"*It can hardly be said, and no authority has been presented to support any suggestion that it is either regular or proper to permit a person convicted of a crime and sentenced to imprisonment in one state to review the conviction through the medium of habeas corpus in the courts of another state to which such person has escaped.*" (Italics ours.)

In *Drew v. Thaw*, 235 U.S. 432, 439, 35 S.Ct. 137, 138, *supra*, Mr. Justice Holmes said:

"In extradition proceedings, even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. *The Constitution* * * * *peremptorily requires*

that upon proper demand the person charged shall be delivered up to be removed to the state having jurisdiction of the crime." (Italics ours.)

The warrant issued by the Governor of this State directing the relator's return to the demanding State recites that he is a fugitive from justice, having been convicted of committing a crime in the State of South Carolina, and that conclusion may not be interfered with or overthrown by this Court except for legal cause none of which, under the applicable decisions, exists in this case. *Hogan v. O'Neill*, 255 U.S. 52, 41 S.Ct. 222; *People ex rel. Corkran v. Hyatt*, 172 N.Y. 176, 189, 64 N.E. 825.

The second point urged by the relator is "that he is a fugitive from injustice rather than a fugitive from justice."

A careful reading of the South Carolina trial record persuades me that the facts therein contained could not act as the foundation for a verdict of guilt in any Court in this State *but that is not the question here.*

It is also fairly apparent that the color of the defendant's skin had no little to do with his conviction.

The application of different standards of justice—one for white defendants and another for Negroes—makes a mockery of the very principles upon which this government was founded and which have made it the leading exponent of democracy in all the world.

Under the circumstances, if the question before me was the doing of pragmatic justice, I would sustain the writ and free the relator. But however I may personally feel about the *factual* unfairness of the verdict, the South Carolina Supreme Court has on two occasions affirmed its *legal* fairness. In addition the United States Supreme Court has judicially determined that the rights of the Relator have not been violated under the Federal Constitution.

This Court's hands are therefore tied. It may not substitute its own ideas for those of the regularly constituted Courts of the demanding State or of the United States Supreme Court.

In this connection the distinction between the powers of the executive branch of the government and its judicial branch in considering a demand for extradition is vital. In the case of the former, there is on rare occasions room for the exercise of discretion, but in the case of a Court there is no discretionary power to

be exercised. Once the *formal requisites* set forth in the extradition statutes are found to be in order, the Court has no choice but to order the extradition to proceed.

It is a case like this where all the equities seem to be on the side of the applicant that tries the soul of a judge who must perforce do his sworn duty within the ambit of the decided cases even though it means being a legal participant in the commission of, what to him seems to be a factual injustice.

The writ of habeas corpus is therefore dismissed and the relator is ordered to be turned over to the authorities of the demanding State. If the relator should desire to test the validity of this Court's determination by an appeal, the execution of the direction that he be turned over to the authorities of the demanding State will be stayed for 10 days to enable the relator to appeal to the Appellate Division and to apply to that Court for a further stay.

CRIMINAL LAW

Trespass—Virginia

Alfred HENDERSON, et al. v. TRAILWAY BUS COMPANY, et al.
Mrs. Minnie ROBINSON, et al. v. George HUNTER, et al.

United States District Court, Eastern District, Virginia, Richmond Division, March 24, 1961, Civil Nos. 3148, 3163, ____ F.Supp.____.

SUMMARY: Certain Negroes, white persons, and "Moorish Americans" (described as neither Negro nor white) were arrested following sit-ins in a cafeteria operated exclusively for white people in a bus company depot in Petersburg, Virginia, and in drug store lunch counters in Hopewell, Virginia. Thereafter, the demonstrators brought an action in federal court against the cities and their officials, the state governor and the businesses, alleging that the trespass statutes enforced against plaintiffs deprive colored people of privileges and immunities secured them by the Equal Protection Clause of the Fourteenth Amendment and by the Civil Rights Act. Plaintiffs asked for the restraint of the enforcement of the statutes and a declaration of their invalidity. Certain Negroes and white persons of Lynchburg, Virginia, were allowed to intervene to protest similar experiences there with the trespass statutes. Conceding that the basic trespass statute was passed in 1934 long before sit-ins were known, plaintiffs contended that amendments thereto, in 1958 increasing the penalty for violation and in 1960 to expand the definition of the premises covered [5 Race Rel. L. Rep. 534 (1960)] and again to increase the penalty, and an additional statute in 1960 forbidding the instigation of trespass [5 Race Rel. L. Rep. 535 (1960)], were all intended and had been invoked against plaintiffs in order to maintain illegal racial segregation. The three-judge district court disposed of the cases together, dismissing the complaints and entering judgments for defendants. Whereas the increased penalties and the instigating statute "may fairly be said to have been enacted with an eye to the 'sit-in,'" the court stated, "The Legislature's motive alone . . . could not invalidate the statute." Although the Petersburg restaurant is a public facility in that it is required to offer service to all interstate bus passengers, the court stated that the question of whether it was legally required to serve these plaintiffs is now academic because the bus company and the terminal has entirely abandoned racial segregation. As to the drug stores in Hopewell, the court held that they are private property and the owners may lawfully forbid persons, "regardless of his reason or their race or religion," to enter or remain on any part of his premises "not devoted to a public use." The assurance of this right was held to be the entire and sole aim of the two code provisions involved. The court pointed out that the statutes were not being applied discriminatorily inasmuch as they were enforced against whites and "Moorish Americans" as well as against Negroes; but even if the

statutes were invalid or unequally applied, these plaintiffs would not be entitled to injunctive relief because a plain and adequate remedy at law is available to them by defending the criminal prosecutions in the state courts, with ultimate right of review in the United States Supreme Court. The court also relied on the precept that a federal court should not interpose its decree between a state and a criminally accused, "save in unusual circumstances—and none is here." And a declaratory judgment was held inappropriate because the issue of criminal responsibility should be left to the state court.

Before BOREMAN, Circuit Judge, and LEWIS and BRYAN, District Judges.

BRYAN, District Judge:

"Sit-in" is the common designation of the conduct for which each of the plaintiffs here has been prosecuted, or threatened with prosecution, under the criminal trespass statutes of Virginia. It consists of the passive and peaceable refusal of a negro, or a white person acting in sympathy with him, to leave a restaurant where on account of his race or color the negro has been denied service of food or beverages at the same counter or other space at which white persons are served. These statutes were intended, and are now invoked, to maintain illegal segregation of persons of the negro from those of the white race, say the plaintiffs in these two companion suits asking for the restraint of the enforcement of the statutes and a declaration of their invalidity. 1950 Va. Code 18.1-173 and 173.1 post. Specifically, it is argued, they deprive the colored people of privileges and immunities secured to them by the equal protection clause of the Federal Constitution's Fourteenth Amendment and by the Civil Rights Acts. 42 USCA 1981, 1983.

The assailed statutes read, so far as pertinent and amended to 1960, as follows:

§18.1-173. Trespass after having been forbidden to do so.—If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail

not exceeding twelve months, or by both such fine and imprisonment."

"§18.1-173.1. Instigating, etc., such trespass by others; preventing service to persons not forbidden to trespass.—If any person shall solicit, urge, encourage, exhort, instigate or procure another or others to go upon or remain upon the lands, buildings, or premises of another, or any part, portion or area thereof, knowing such other person or persons to have been forbidden, either orally or in writing, to do so by the owner, lessee, custodian or other person lawfully in charge thereof, or knowing such other person or persons to have been forbidden to do so by a sign or signs posted on such lands, buildings, premises or part, portion or area thereof at a place or places where it or they may reasonably be seen; or if any person shall, on such lands, buildings, premises or part, portion or area thereof prevent or seek to prevent the owner, lessee, custodian, person in charge or any of his employees from rendering service to any person or persons not so forbidden, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment."

As the design and meaning of these statutes have been painstakingly expounded by the Supreme Court of Appeals of Virginia, we proceed without stay for further State court interpretation. Hall v. Com., 188 Va. 72, 49 S.E.2d 369 (1948), app. dismissed 335 U.S. 875, rehearing denied 335 U.S. 912; cf. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959).

In No. 3148 the incident of the complaint arose in Petersburg, Virginia in the bus depot of the Trailway Bus Company. It occurred in the lunchroom operated there by the Bus Terminal Restaurant of Virginia, Inc. The plaintiffs asked to

be served at the cafeteria which was assigned exclusively for white patrons. When they were declined service, they refused to move from that area and thereupon they were arrested as violators of § 18.1-173, supra, now to be called the trespass statute.

Discontinuance of the present action as to the Trailway Bus Company, its manager and the Bus Terminal Restaurant of Virginia, Inc., having been asked by the plaintiffs and granted, the only defendants remaining are the City of Petersburg, its City Manager and the Governor of Virginia. Racial segregation has now been entirely abandoned by Trailway and Bus Terminal. Further pursuance of the suit rests on the allegation of fear of a resumption of the practice.

The grievances of the complaints in No. 3163 arose in the City of Hopewell, Virginia, at George's Rexall Drug Stores. The behavior charged as a breach of the trespass statute is of the same pattern as the events of No. 3148. Certain negroes and whites of Lynchburg, Virginia, have been allowed to intervene in the case to protest similar experiences there with these statutes. The defendants are the Drug Stores, the City of Hopewell, its Mayor and the Governor of Virginia.

I. Although conceding that the trespass statute was passed by the General Assembly of Virginia in 1934, long before the "sit-in" was known, the plaintiffs point to the amendments and additions of 1958 and 1960 as giving the law an unconstitutional cast. Now to be called the instigating statute, section 18.1-173.1 first appeared in 1960. The trespass statute was amended in 1958 in respect to the penalty: the fine raised to \$100.00 and possible confinement in jail not exceeding thirty days added. In 1960 the trespassing statute was again amended to define the premises covered as including buildings and portions thereof, and to enlarge the maximum punishment to a fine of \$1,000.00 or confinement in jail not exceeding twelve months. Both of the 1960 enactments became effective before the episodes related in the complaints. But with these exceptions and a 1956 amendment providing for the posting of notices, the trespass statute has remained substantially unchanged since 1934.

The increased punishments and the instigating statute may fairly be said to have been enacted with an eye to the "sit-in". The Legislature's motive alone, however, could not invalidate the

statute. Besides, the criminal elements of the present statutes are no more expansive than were those of the 1934 trespass statute.

But, in any event, the critical factor is that the statutes apply only to places where a person goes "without authority of law", meaning property not at the time affected with a public interest. Racial segregation on property in private demesne has never in law been condemnable. Indeed, the occupant may lawfully forbid any and all persons, regardless of his reason or their race or religion, to enter or remain upon any part of his premises which are not devoted to a public use. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4 Cir. 1959); *Slack v. Atlantic White Tower System*, 284 F.2d 746 (4 Cir. 1960). Assurance of this right is the entire and sole aim of the two code provisions before us. *Hall v. Commonwealth*, supra, 188 Va. 72, 49 S.E.2d 369, 371. In there sustaining the statute, the Virginia Court relied in part upon *Martin v. City of Struthers*, 319 U.S. 141, 147, where Justice Black said:

"Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. . . ."

The determinative question here, then, is whether the property in either of these cases was dedicated, even though temporarily, to anything other than a private use. Clearly, the Petersburg Depot Restaurant in one aspect was a public facility: it was required to offer service to all interstate passengers of Trailway, no matter their race or color. *Boynton v. Virginia*, 364 U.S. 454 (1960). However, as to this location the issue is academic for, as already noted, segregation has been abolished there; and no threat of its resumption is apparent. But the drug store in Hopewell was and is still in private use. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 846, supra; *Slack v. Atlantic White Tower System*, 284 F.2d 746, supra. It follows that the statutes are not vulnerable to the charge of illegality.

II. After accrediting all of the plaintiffs' testimony with its face value, still no proof appears of discrimination against negroes in the invocation of the statutes. There are no instances ad-

duced of differentiation between the races in the execution of these laws. Indeed, the evidence reveals that both whites and negroes were arrested for the transgressions, as well as persons identified as "Moorish Americans", who are described as being neither white nor negro. It is noteworthy that *Hall v. Commonwealth*, supra, upheld the legislation in the conviction of members of a religious sect not known by race or color.

III. But if we have erred in not finding infirmity in these statutes or inequality in their enforcement, nevertheless the plaintiffs have not shown an entitlement to an injunction. In the first place, a plain and adequate remedy at law is available to them, and this readiness, of course, completely refutes their appeal to equity jurisdiction. Redress at law is provided in their opportunity to defend the criminal prosecutions, indeed to stand mute until a case is made against them beyond a reasonable doubt under these very statutes, with no burden whatsoever upon them as defendants there. Nothing here indicates that a full and fair presentation, hearing and consideration of their views upon the validity of the two statutes cannot be had before the State courts in these prosecutions. *Spence v. Cole*, 137 F.2d 71, 72 (4 Cir. 1943). There is also the ultimate right of review in the Federal Supreme Court, as illustrated by *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Irreparable injury to the plaintiffs through submission of their contentions in this manner to the State tribunals is not demonstrated. This circumstance obviously undermines all foundation for the injunction claimed.

Strengthening this conclusion is the time-honored, judicious precept that a Federal court should never interpose its decree between a State and a criminally accused save in unusual circumstances—and none is here. *Spence v. Cole*, 137 F.2d 71, 73, supra. So recently as February 27, 1961 the Supreme Court reaffirmed this rule. Aptly speaking to this point for the Court, in *Wilson v. Schnettler*, Justice Whittaker summarized the doctrine in this language:

"... If, at the criminal trial, the Illinois court adheres to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right if need be

to petition for 'review by this Court of any federal questions involved.' *Douglas v. City of Jeannette*, 319 U.S. 157, 163. It is therefore clear that petitioner has a plain and adequate remedy at law in the criminal case pending against him in the Illinois court.

"There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' *Ponzi v. Fessenden*, 258 U.S. 254, 259. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is both clear and imminent; . . . ' *Douglas v. City of Jeannette*, supra, at 163."

The declaratory judgement prayed by the plaintiffs must also be denied. That procedure we deem inappropriate in the circumstances because the issue of criminal responsibility should be left to the State court. *Spence v. Cole*, 137 F.2d 71, 73, supra.

As the complaints tender no ground for injunctive or declaratory adjudication, they must be dismissed. The judgments will go for the defendants upon their motions to dismiss treated as motions for summary judgement.*

*Plaintiffs' counsel have signed the pleadings in these cases with an informality not in good taste professionally, and hardly in keeping with the dignity of a law suit. For example "Hank" appears throughout for the first name of one attorney whose business listing is Henry; likewise "Joe" is adopted for Joseph; "Ed" for Edward; and "Len" appears for Leonard. Moreover, deletions and insertions are made in a type-written motion, unauthenticated and by pencil. These improprieties ought not to go unnoticed. It is suggested that each of the attorneys now personally correct his own remissness by reendorsement and reentries upon the papers.

CRIMINAL LAW

Trespass—Virginia

Raymond B. RANDOLPH, Jr. v. COMMONWEALTH of Virginia.

Supreme Court of Appeals of Virginia, April 24, 1961, Record No. 5233, 119 S.E.2d 817.

SUMMARY: Thirty-four Negroes were convicted in the Richmond, Virginia, police court on charges of violating a state statute making it a misdemeanor for "any person" without authority of law to go upon or remain upon the premises of another after having been forbidden to do so by the owner, lessee, or other person lawfully in charge or by a sign posted on the premises. On appeal, the Hustings Court found them guilty of trespass and fined each in the sum of \$20. The state supreme court of appeals granted a writ of error to one of the defendants, and affirmed the judgment. It was found that: defendants were refused service at a "white" lunch counter in a Richmond department store because of their race; the store's personnel manager asked defendant to leave the store, but defendant refused to do so; and the personnel manager then procured an arrest warrant. The supreme court of appeals concluded that there was no evidence to support the contention that defendant was arrested because of his race or color, but rather that the evidence showed he was arrested because he remained on the store premises although forbidden to do so by an authorized agent of the owner. It was also held that "the statute does not purport to be and is not a racial segregation law" since "it forbids 'any person' irrespective of his race or color." The court rejected the argument that the manner in which the statute was applied under the circumstances of this case amounted to a denial to defendant of Fourteenth Amendment rights, holding that the Fourteenth Amendment is not a shield against private discriminatory conduct and that a private business may discriminate racially among its clientele. The contention that procuring an arrest warrant constituted state action to enforce a discriminatory rule contrary to the Fourteenth Amendment was also overruled; the purpose of the judicial process here was held to be to protect the rights of the proprietor in lawful possession of the premises and to punish the trespasser, irrespective of race or color.

EGGLESTON, Chief Justice.

Raymond B. Randolph, Jr., hereinafter called the defendant, was one of thirty-four Negroes arrested under separate warrants charging each with trespassing on the property of Thalhimer Brothers, Incorporated, in violation of Code, § 18-225, as amended. Each was convicted in the police court and upon appeal to the Hustings Court, with their consent and the concurrence of the court and the attorney for the Commonwealth entered of record, the several defendants were tried jointly by the court and without a jury. Upon consideration of the evidence the court adjudged that each defendant was guilty of trespass as charged and assessed a fine of \$20 against each. To review this judgment each defendant has filed a petition for a writ of error. We have granted the defendant, Randolph, a writ of error and deferred action on the other petitions until this case has been disposed of.

Section 18-225 of the Code of 1950 (as amend-

ed by Acts of 1956, ch. 587, p. 942; Acts of 1958, ch. 166, p. 218) reads as follows:¹

"§ 18-225. *Trespass after having been forbidden to do so.*—If any person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge of such land, or after having been forbidden to do so by sign or signs posted on the premises at a place or places where they may be reasonably seen, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars or by confinement in jail not exceeding thirty days, or by both such fine and imprisonment."

1. This statute was further amended by the Acts of 1960, ch. 97, p. 113, and as so amended was recodified as Code, 1960 Replacement Volume, § 18.1-173, by the Acts of 1960, ch. 358, p. 448.

On this appeal the defendant makes several contentions which overlap but may be fairly summarized thus: (1) The judgment is contrary to the law and the evidence in that there is no showing that the defendant was guilty of having violated the statute; (2) The statute as here applied violated the rights guaranteed to the defendant by the fourteenth amendment to the Constitution of the United States.

The undisputed facts are before us on the evidence heard in open court and a stipulation of the parties. Thalhimer Brothers, Incorporated, a privately owned corporation, operates a large department store in the city of Richmond. It operates lunch counters in the basement and on the first floor and a restaurant on the fourth floor. Negro patrons are served at one of the lunch counters in the basement. Only white patrons are served at the other lunch counters and in the restaurant. The separation of these facilities for serving white and Negro customers, respectively, is well known to the patrons of the store.

On February 22, 1960, the defendant and the thirty-three other Negroes who were convicted in this proceeding went to the Thalhimer store and attempted to obtain service at the facilities reserved for the use of white patrons. Because of their race they were refused service at these facilities.

Ben Ames, the personnel manager of the store and an employee of the corporation which operates it, talked with the defendant who was then at the entrance to the restaurant on the fourth floor, a facility reserved for white patrons. To use Ames' words, "I asked him to leave our store and explained to him, if he did not, that I would authorize the issuance of a warrant for his arrest." While the defendant made no reply to this request, he refused to leave the store. It is undisputed that Ames took this action at the direction of Newman Hamblett, the vice-president of Thalhimer Brothers, Incorporated, and the "director of operations" of the store. Ames did not identify himself to the defendant, who, however, did not question his authority. In the meantime, as the defendant testified, he had obeyed the command of Hamblett, whom he identified by name at the trial, to stand in line near the restaurant entrance and wait his turn. When the defendant refused to leave the store, Ames, at the further direction of Hamblett, procured the warrant of arrest which is the basis of this prosecution.

Viewed in the light most favorable to the Commonwealth, the prevailing party, the evidence is sufficient to sustain the judgment of the lower court that the defendant was guilty of violating the statute. There is no evidence to support his contention that he was arrested because of his "race or color." On the contrary, the evidence shows that he was arrested because he remained upon the store premises after having been forbidden to do so by Ames, the duly authorized agent of the owner or custodian.

It is true that Ames did not identify himself or disclose his authority to the defendant. Aside from the fact that the statute does not require this, the evidence on behalf of the Commonwealth supports the inference that the defendant knew that Ames was a person in authority. As has been said, Ames testified that he asked the defendant to leave "our store" and explained to him that he would be arrested if he did not do so. The defendant did not question Ames' authority. It was obvious to him that Ames was acting in conjunction with Hamblett, the vice-president and director of operations of the store, whom the defendant apparently knew and identified by name. The defendant himself testified that he refused to leave the store after having been asked by Ames to do so.

Thus, it plainly appears from the evidence that the defendant violated the statute in that he willfully and purposely remained on the premises after he had been forbidden to do so by the owner's duly authorized agent.

The statute does not purport to be and is not a racial segregation law. It forbids "any person," irrespective of his race or color, "without authority of law" to "go upon or remain upon the lands or premises of another," after having been forbidden to do so. As we said in *Hall v. Commonwealth*, 188 Va. 72, 77, 49 S.E.2d 369, 371 (appeal dismissed 335 U.S. 875, 69 S.Ct. 240, 93 L.Ed. 418), "The only purpose of this law is to protect the rights of the owners or those in lawful control of private property." In that case we upheld the constitutionality of the statute as applied to a member of the sect of Jehovah's Witnesses who, after proper warning, refused to leave a private apartment building.

See also, *Henderson v. Trailway Bus Company*, D.C.Va., -F.Supp. - (decided March 24, 1961, by Boreman, Circuit Judge, and Lewis and Bryan, District Judges), upholding the constitutionality of this statute as amended and re-

codified as Code, 1960 Replacement Volume, § 18.1-173.

The defendant does not contend that the statute is unconstitutional on its face. His argument is that the manner in which it was applied, under the circumstances of this case, amounted to a denial of rights guaranteed to him by the Fourteenth Amendment. First, he says, since the store was "open to the public" and he was there as a "business invitee," the refusal to serve him because of his "race or color" was a denial of his constitutional rights. In recent years this same argument has been advanced in a number of jurisdictions and without exception has been rejected. See *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295; *State v. Avent*, N.C. —, 118 S.E.2d 47; *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F.2d 845; *Slack v. Atlantic White Tower System, Inc.*, D.C.Md., 181 F.Supp. 124, affirmed 4 Cir., 284 F.2d 746; *Griffin v. Collins*, D.C.Md., 187 F.Supp. 149; *Wilmington Parking Authority v. Burton*, — Del. —, 157 A.2d 894.²

The holding in these cases is based upon the principle that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (*Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161, 3 A.L.R.2d 441), and that in the absence of statute the operator of a privately owned business may accept some customers and reject others on purely personal grounds. See *Alpaugh v. Wolverton*, 184 Va. 943, 36 S.E.2d 906, where the principle was applied in the operation of a privately owned restaurant.

The controlling principle is thus stated in *State v. Avent*, *supra*: "In the absence of a statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or white people in company with Negroes or vice versa, if he so desires." 118 S.E.2d, at page 51.

2. Reversed on other grounds. U.S.
S. Ct., L. ed. (April 17, 1961).

It is "well settled that, although the general public have an implied license to enter a retail store, the proprietor is at liberty to revoke this license at any time as to any individual, and to eject such individual from the store if he refuses to leave when requested to do so." Annotation, 9 A.L.R. 379. See also, Annotation, 33 A.L.R. 421. To the same effect see *Brookside-Pratt Mining Co. v. Booth*, 211 Ala. 268, 100 So. 240, 33 A.L.R. 417.

As was said in *Henderson v. Trailway Bus Company*, *supra*, — F.Supp. —, "[T]he occupant may lawfully forbid any and all persons, regardless of his reason or their race and religion, to enter or remain upon any part of his premises which are not devoted to a public use."

Hence, in the present case, the action of Thalhimer Brothers, Incorporated, in refusing to serve the defendant in its restaurant and in forbidding him to remain on its premises violated none of his constitutional rights.

The defendant next contends that when the owner of the restaurant, through its employee, procured the warrant for the defendant's arrest, this constituted State action to enforce a discriminatory rule or regulation of the restaurant contrary to the provisions of the Fourteenth Amendment. A similar argument was advanced and rejected in *State v. Clyburn*, *supra*, 101 S.E. 2d, at page 299; *State v. Avent*, *supra*, 118 S.E.2d, at page 54; *Griffin v. Collins*, *supra*, 187 F.Supp., at pages 153, 154. See also, 47 Virginia Law Review 105, 119. Here the purpose of the judicial process is not to enforce a rule or regulation of the operator of the restaurant. Its purpose is to protect the rights of the proprietor who is in lawful possession of the premises and to punish the trespasser, irrespective of his race or color. See *Hall v. Commonwealth*, *supra*, 188 Va. 72, 49 S.E.2d 369.

It would, indeed, be an anomalous situation to say that the proprietor of a privately owned and operated business may lawfully use reasonable force to eject a trespasser from his premises and yet may not invoke judicial process to protect his rights.

The judgment, being plainly right, is

Affirmed.

ELECTIONS

Registration—Louisiana

UNITED STATES of America v. Baxter DEAL, et al.

United States District Court, Western District, Louisiana, Monroe Division, February 3, 1961, Civil Action No. 8132.

SUMMARY: The United States brought an action in federal court under Part IV of the Civil Rights Act of 1957 against owners, operators, and managers of cotton gin companies and certain other businesses, and the sheriff of East Carroll Parish, Louisiana, alleging commission by defendants of practices which deprive Negro citizens of that parish of the right to be free from threats and intimidation for the purpose of interfering with the right to register and vote for candidates for federal office, and alleging a conspiracy by defendants to accomplish that purpose. It was specifically alleged that on September 27, 1960, a named Negro cotton farmer testified at a hearing of the United States Civil Rights Commission concerning his efforts to register to vote; that on the following day the sheriff advised him that cotton ginner in the parish would no longer gin for him; and that subsequently defendants had refused to gin and to conduct other ordinary business transactions with him, had induced others so to refuse, and would continue to engage in such conduct and conspiracy unless enjoined therefrom. Finally, defendants were charged with injuring, oppressing, threatening, and intimidating the named Negro because of his appearance and testimony before the Commission and in order to dissuade him and others from appearing and testifying before or furnishing information to the Commission or other United States agency regarding alleged deprivations of the right to vote. Plaintiff prayed for an injunction against the alleged conduct and practices; and in that connection it applied for an order to show cause, which it supported with an affidavit of the Negro farmer. The court entered an order to show cause and a temporary restraining order against defendants pending hearing on the order. Plaintiff then moved for a preliminary injunction. Thereafter the parties entered into a stipulation that the action be continued indefinitely, having agreed that defendants would gin the Negro farmer's cotton and enter into other business transactions with him on specified conditions and that they would not intimidate or threaten him for the purpose of interfering with his right to vote for candidates for federal offices.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

It appearing from the Affidavit of Francis Joseph Atlas filed by the plaintiff in support of its application for a temporary restraining order and order to show cause that Francis Joseph Atlas is a Negro who resides in East Carroll Parish, Louisiana, and is a citizen of the United States; that on several occasions Francis Joseph Atlas has unsuccessfully attempted to register to vote; that on September 27, 1960, Francis Joseph Atlas testified before the United States Commission on Civil Rights concerning his efforts to register to vote; that under Louisiana law registration is a prerequisite to voting in any election, including elections of candidates for federal offices; that as of December 6, 1960, there were 2845 white persons and no Negroes registered to vote in East Carroll Parish; that Francis Joseph Atlas is a farmer and raises cot-

ton; that Francis Joseph Atlas and his family depend for their livelihood mainly upon the sale of his cotton and soy bean crops; that certain of the defendants own, operate, manage, or otherwise control the operation of cotton gins located in East Carroll Parish; that others of the defendants are corporations engaged in the business of ginning cotton in that parish; that some of the defendant cotton ginner have ginned cotton for Francis Joseph Atlas prior to the 1960 crop year; that defendants Gittinger, Mitchiner, Olivedell Gin and Olivedell Planting Co. ginned cotton for Francis Joseph Atlas on September 24, 1960, three days before he testified concerning his efforts to register to vote; that the defendants have threatened, intimidated, and coerced Francis Joseph Atlas and other Negro citizens of East Carroll Parish for the purpose of interfering with their right to register to vote and to vote in any elections including elections for candidates for federal offices; that beginning

on September 28, 1960, the day after Francis Joseph Atlas testified concerning his efforts to register to vote, and continuing to the present time the defendant cotton ginner, both individual and corporate, have refused and are refusing to gin cotton for Francis Joseph Atlas; that the defendant cotton ginner have combined, conspired and agreed to refuse to gin cotton for Francis Joseph Atlas; that on September 28, 1960, the same evening that Francis Joseph Atlas returned home after testifying concerning his efforts to register to vote, he was told by defendant Sheriff John Gilbert not to take his cotton to any gin in East Carroll Parish, because the ginner would not gin it; that for the 1960 crop year Francis Joseph Atlas has about 19 bales of cotton which the defendant cotton ginner have refused to gin; that unless his cotton is ginned, it cannot be marketed; that the other defendants have failed and refused to sell goods and services to, or to conduct other transactions with, Francis Joseph Atlas in the ordinary course of business; that Francis Joseph Atlas is undergoing serious economic hardship and will suffer irreparable injury unless he is able to gin and market his cotton immediately and obtain other goods and services necessary to operate his farm; that unless a temporary restraining order is granted as prayed for, the plaintiff will suffer great and irreparable injury before the matter can be heard on notice because the serious economic penalties which Francis Joseph Atlas has suffered and will suffer has deterred him and other Negroes in East Carroll Parish from exercising their present right under the Constitution and laws of the United States to register to vote and to vote in any election, including elections for candidates for federal offices; all to the immediate and irreparable injury of the plaintiff.

And the Court being of the opinion that this is a proper case for the granting of an order to show cause and a temporary restraining order; now therefore,

IT IS HEREBY ORDERED that each of the defendants named in the Complaint appear before this Court in the Courtroom of the Federal District Court for the Western District of Louisiana at the Post Office Building in Louisiana, at — o'clock on the — day of — 1961, then and there to show cause, if any they have, why they, and each of them, and any of their agents, employees, representatives, and all persons in active concert or participation with said de-

fendants should not be enjoined and restrained from engaging in, or performing, directly or indirectly, any and all of the following acts:

1. refusing to gin cotton for Francis Joseph Atlas in accordance with the ordinary terms, conditions, and practices prevailing in the community;
2. refusing to sell goods and services to, and to conduct ordinary business transactions with, any person for the purpose of discouraging or dissuading such person from attempting to register to vote or from voting for candidates for federal office or from giving information or testimony to any Department or agency of the United States;
3. threatening, intimidating, or coercing, or attempting to do so by any means, for the purpose of interfering with the right of any other person to register to vote and to vote for candidates for federal office or for the purpose of intimidating or dissuading any other person from giving information or testimony to any Department or agency of the United States;
4. inducing, or attempting to induce, any person to engage in any of the acts described in subparagraphs "1," "2," and "3" above;
5. combining or conspiring to engage in any of the acts described in subparagraphs "1," "2," "3," and "4" above.

IT IS FURTHER ORDERED that, pending the hearing of this order to show cause, the defendants, and each of them, and their agents, employees, representatives, and all persons acting in concert or participation with them, shall be and hereby are restrained and enjoined from engaging in, or performing, directly or indirectly, any and all of the following acts:

1. refusing to gin cotton for Francis Joseph Atlas in accordance with the ordinary terms, conditions, and practices prevailing in the community;
2. refusing to sell goods and services to, and to conduct ordinary business transactions with, any person for the purpose of discouraging or dissuading such person from attempting to register to vote and from voting for candidates for federal offices or from giving information or testimony to any Department or agency of the United States;
3. engaging in any threats, intimidations, or

coercion, or attempted threats, intimidation, or coercion of any nature, whether economic or otherwise, for the purpose of interfering with the right of any other person to register to vote and to vote for candidates for federal offices or for the purpose of discouraging or dissuading any other person from giving information or testimony to any Department or agency of the United States;

4. inducing, or attempting to induce, any person to engage in any of the acts described in subparagraphs "1," "2," and "3" above;
5. combining or conspiring to engage in any of the acts described in subparagraphs "1," "2," "3," and "4" above.

IT IS FURTHER ORDERED that a copy of the affidavit and the application, together with a copy of this order to show cause and temporary restraining order, and a copy of the complaint be served by the United States Marshal of this District on the defendants forthwith.

Dated this — day of January, 1961, at — o'clock.

* * *

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves this Court for a preliminary injunction as set forth in the order to show cause to be issued after the hearing held pursuant to that order.

This Motion will be heard upon all the pleading and papers on file, together with the affidavit, documents and memorandum of law attached to the Complaint, and oral testimony to be adduced at the hearing.

Dated this 20th day of January 1961.

* * *

STIPULATION

It is stipulated by all parties hereto that the above entitled and numbered action be continued indefinitely, the said parties having agreed as follows:

A. DEFENDANTS will arrange for:

- 1) The prompt ginning of all Francis Joseph Atlas' 1960 cotton crop;
- 2) A purchaser, at fair current market

value, of all Francis Joseph Atlas' 1960 soyabean corp; and,

- 3) A supplier of liquified petroleum gas for the said Francis Joseph Atlas;

provided the said Francis Joseph Atlas:

- 1) will be solely responsible for harvesting and transporting to market of his said crops of cotton and soyabeans; provided, however, with respect to the 1960 cotton crop, Francis Joseph Atlas shall not be required to bear hauling expenses greater than the expense necessary to transport the cotton to the nearest gin;
- 2) will pay the usual and customary costs of ginning cotton, drying and cleaning soyabeans, and other such processing as may be necessary; and,
- 3) will pay cash money at the time of delivery of all supplies of liquified petroleum gas.

B. DEFENDANTS further agree that they will not intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce the said Francis Joseph Atlas for the purpose of interfering with the right of the said Francis Joseph Atlas to vote, or to vote as he may choose, or of causing him to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, delegates or commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

C. The agreements herein contained are for the purpose of compromise only, and in no wise constitute or are to be interpreted as an admission by any party defendant of the truth of all or any part of the allegations of the captioned complaint, or of any statement or declaration contained in the Affidavit of Francis Joseph Atlas (an Affidavit containing eleven pages) executed in Caddo Parish, Louisiana, on January 19, 1961, by Francis Joseph Atlas, before Leven H. Harris, Notary Public, which is annexed to said complaint.

Monroe, Louisiana, this 3rd day of February, 1961.

ELECTIONS

Registration—North Carolina

Nancy BAZEMORE v. BERTIE COUNTY BOARD OF ELECTIONS.

Supreme Court of North Carolina, April 12, 1961, No. 168-Bertie, 119 S.E.2d 817.

SUMMARY: Plaintiff, a Negro woman, applied for registration as a voter in North Carolina. As a qualifying test, she was required to write a portion of the state constitution as the registrar dictated. She was then declared unqualified to vote. She appealed to the county board of elections, which offered to test her ability "to read and write any section of the Constitution of North Carolina in the English Language," as the state statute required. A board member began to dictate, but plaintiff declined to take the test in this form. On appeal, the superior court granted the board's motion to dismiss on the ground that plaintiff had refused to submit to the test. Plaintiff then appealed to the North Carolina Supreme Court, which construed the statute involved to mean that prospective applicants must have the ability "to read with reasonable proficiency any section of the Constitution *put before him or her*. Excessive reading and writing may not be required. Writing from dictation is not a requirement." The Superior court was directed to enter an order requiring the registrar to administer the literacy test in accordance with this construction of the statute.

Appeal by plaintiff from Stevens, J., August-September 1960 Term of Bertie.

This is a civil action.

Plaintiff, Nancy Bazemore, is a Negro, 47 years of age, and for many years has resided within the boundaries of Woodville Township voting precinct, Bertie County. On 14 May 1960 she applied to the registrar of that precinct to register as an elector. The books were open for registration. As a qualifying test the registrar required her to write, from his reading and dictation, a portion of the Constitution of North Carolina. When the test was completed the registrar declared that she was not qualified to register and declined to list her as an elector in the precinct.

In apt time and in compliance with the pertinent statute plaintiff appealed to the Bertie County Board of Elections. All members of the Board were present when the appeal was heard. Plaintiff was present in person and represented by counsel. The Board offered to test her ability "to read and write any section of the Constitution of North Carolina in the English language." A member of the Board began to read a section of the State Constitution and requested plaintiff to write it from his dictation. Upon advice of counsel she declined to take this test. Thereupon, the Board refused registration because she would not submit to this test.

Plaintiff appealed to the Superior Court. Defendant, Board of Elections, moved to dismiss

the appeal on the ground *inter alia* that plaintiff refused to submit to the test offered by the Board.

The court made findings of fact. Those essential to this appeal are:

At the hearing before the Board "the plaintiff took a seat at the table opposite the members of the said Bertie County Board of Elections preparatory to writing; . . . a member of the Board then began to read in a clear and reasonable tone of voice and at a reasonably slow rate of speed a section of the Constitution of North Carolina to the said Nancy Bazemore who was requested to write as the same was being read to her, . . . that she failed and neglected at said time to take and submit to the reasonable test offered and begun to be administered to her upon the *de novo* hearing before said board. . . . (T)he . . . Board . . . decided that her appeal should be denied and registration refused . . ."

Thereupon the court entered judgment "that the motion of defendants to dismiss said action . . . be and the same is hereby allowed and the said action is hereby dismissed from the Docket . . ."

Plaintiff filed exceptions and appealed.

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MOORE, J.

It is undisputed that the States have broad powers to determine the conditions under which the right of suffrage may be exercised. Pope v. Williams, 193 U.S. 621, 632 (1903); Mason

v. Missouri, 179 U.S. 328, 335 (1900). The right of suffrage is not a necessary attribute of citizenship. The right to vote in the States comes from the States. *United States v. Cruikshank*, 92 U.S. 542, 555-6 (1875).

In North Carolina every citizen of the United States who shall have resided in the State for one year and in the precinct, ward, or election district in which he or she offers to vote, thirty days preceding the election shall, unless otherwise disqualified, be entitled to exercise the privilege of suffrage. G. S. 163-25.

Persons under twenty-one years of age, idiots and lunatics, and persons who have been convicted of a felony and have not had their citizenship restored in the manner prescribed by law, shall not be allowed to register or vote in this State. G. S. 193-24.

"Only such persons as are registered shall be entitled to vote . . ." G. S. 163-27.

"Every person presenting himself (or herself) for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section." (Parentheses added). G. S. 163-28.

The decision in the instant case depends primarily upon the interpretation and construction of G. S. 163-28. So far as the record discloses plaintiff was not denied the right to register because of any of the provisions of G. S. 163-24 or G. S. 163-25. We must determine this question: Is the educational or literacy test, which the registrar required of plaintiff and which the Bertie County Board of Elections attempted to employ, a reasonable application of the purpose, design and meaning of the phrase, "read and write any section of the Constitution of North Carolina in the English language"?

Parenthetically, it is settled that this particular statute (G. S. 163-28) is constitutional. Its constitutionality was directly challenged in *Lassiter v. Board of Elections*, 248 N. C. 102, 102 S. E. 2d 853 (1958). Winborne, C. J., delivered the opinion of the Court and reviewed the constitutional and statutory history of the literacy test as a qualification for voting in this State, beginning with chapter 218, P. L. 1899, and the constitutional amendment of 1902, and continuing through the enactment of G. S. 163-28 in its present form in 1957. The opinion recognizes that the decision in *Guinn v. United States*, 238 U. S. 347 (1915), in effect struck down the "grandfather clause" and, by reason of the in-

divisibility section, the other provisions of the 1902 amendment. But the Court decided that the 1945 amendment incorporates by reference the literacy test and gives constitutional basis for the 1957 version of G. S. 163-28. The opinion states: "In this light, the 1945 amendment so proposed and later adopted had the effect of incorporating and adopting anew the provisions as to the qualifications required of a voter as set out in Article VI, freed of the indivisibility clause of the 1902 amendment. And the way was made clear for the General Assembly to act." The opinion continues: "In this connection, a doctrine firmly established in the law is that a State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it."

The plaintiff in the *Lassiter* case appealed from this Court to the Supreme Court of the United States. *Lassiter v. Northampton Election Bd.*, 360 U. S. 45 (1959). There the judgment of this Court was affirmed by unanimous decision. Douglas, J., delivered the opinion and made the following pertinent observations:

"... (W)hile the right of suffrage is established and guaranteed by the Constitution (Ex parte *Yarborough*, 110 U. S. 651, 663-665; *Smith v. Allwright*, 321 U. S. 649, 661-662) it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed. See *United States v. Classic*, 313 U. S. 299, 315. . . .

"We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. . . . The ability to read and write likewise has some relation to standards designed to promote intelligent use of the ballot. Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show. . . . (I)n our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise. . . .

"The present (North Carolina) requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a

person is literate, not a calculated scheme to lay springs for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot." (Parentheses added).

Reasonable literacy tests to determine qualifications for voting have been consistently held constitutional. *Williams v. Mississippi*, 170 U. S. 213, 225 (1898); *Davis v. Schnell*, 81 F.Supp. 872, 876 (1949), *aff'd*, 336 U.S. 933 (1949). See also *Allison v. Sharp*, 209 N. C. 478 (1936). In 1955 there were nineteen States with constitutional or statutory requirements of literacy as a qualification for exercise of suffrage: Alabama, Arizona, California, Connecticut, Delaware, Georgia, Louisiana, Maine, Massachusetts, Mississippi, North Carolina, New Hampshire, New York, Oklahoma, Oregon, South Carolina, Washington, Wyoming and Virginia. 31 *Notre Dame Lawyer*, 255 *et seq.*

The North Carolina statute requires ability to read and write any section of the State's Constitution in the English language. It demands more than the mere ability to write one's own name and to recognize and read a few simple words. In the first place, the reading and writing must be in the English language—the common language of the Nation. The standard or level of performance is the North Carolina Constitution. To be entitled to register as an elector one must be able to read and write any section thereof. Admittedly, the standard is relatively high, even after more than a half century of free public schools and universal education. But the Constitution is the fundamental law of the State and defines the form and concept of our government. It is the framework for democracy. It contains the same basic guaranties of individual rights and liberties and the same principles of representative government and division of powers as are embodied in the Constitution of the United States. There is a direct relationship between the standard of literacy thus imposed and citizenship of the type which should entitle one to exercise the ballot. Furthermore, there is little excuse for illiteracy in this State. North Carolina has a constitutional obligation to provide for the education of all its children. *Allison v. Sharp*, *supra*. "The General Assembly . . . shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six

and twenty-one years." Constitution of North Carolina, Art. IX, s. 2 (1868-1961). This constitutional provision has been well implemented for more than fifty years.

We have consulted five unabridged dictionaries, all in general use. A definition of "literacy," common to all these, is: "Ability to read and write." In Webster's New International Dictionary, 2d Ed. (1951), the definitions, of widest application, of the words "read" and "write" are: "read—To utter aloud or render something written . . ."; "Write—To form, as characters, or to trace the letters or words of, on paper, parchment, etc., with a pen or pencil . . ." There are many other definitions, but they are more limited in application. For instance, in oratory, declamation, drama or music the word "read" has a more specialized meaning. Likewise, to an author or composer "write" means something more than the tracing of words.

Educators have an expression "functional literacy." ". . . (A) person is functionally literate when he has acquired the knowledge and skills in reading and writing which enable him to engage effectively in all those activities in which literacy is normally assumed in his culture or group." William S. Gray—*The Teaching of Reading and Writing: An International Survey* (1956). Functional literacy is a praiseworthy goal in education, and a high standard of literacy among all citizens is extremely desirable. But it is our opinion that the General Assembly intended the words "read" and "write" as used in G. S. 163-28 to have those meanings commonly attributed to them in ordinary usage. In construing that section, we give to the words their ordinary, natural and general meaning.

The Constitution of Wyoming provided that "No person shall have the right to vote who shall not be able to read the constitution of this State." In interpreting this provision the Supreme Court of Wyoming said: ". . . (W)e think it should follow that any provision which excludes any class of citizens from the exercise of the elective franchise ought to receive a strict construction, without, however, doing violence to or distorting the language, to the end that none shall be held excluded who are not clearly designated." (p. 822) A concurring opinion comments further: "But the requirement of the Constitution is much more than that the voter shall simply be able to read. It is that he shall be able to read a particular instrument,—the Constitution of this state." These additional

words cannot be treated as mere surplusage, and rejected from our consideration. . . . The requirement is not that the voter shall have studied or shall understand and comprehend the contents or substance of it, but that he shall be able to read the specific instrument. He must have that much and that character of education." (p. 829). *Rosmussen v. Baker*, 50 P. 819 (1897).

In the instant case, it is our opinion that G. S. 163-28 requires nothing more than the mere ability to read and write any section of the State Constitution in the English language. We hold that under the provisions of this section a test of literacy that requires an applicant for registration to write a section or sections of the Constitution from the reading and dictation of another, however fairly and clearly the same might be read and dictated, is unreasonable and beyond the clear intent of the statute. The statute contemplates that the applicant shall utter aloud and render in the English language any section of the North Carolina Constitution from a legible copy of such Constitution furnished applicant for that purpose, and put down in his own handwriting any section thereof with such section before him for reference in writing the same. It is not a spelling test. Furthermore, the taking of dictation, even in longhand, requires skill, learning and practice over and beyond the ordinary process of writing.

It is suggested in the *amicus curiae* brief that writing from dictation is not unreasonable for that a blind person would be unable otherwise to copy a section. We suggest that a blind person could not read from an ordinarily printed page. Neither could a deaf-mute read aloud or take dictation. One without hands could not write at all. For the handicapped fair tests may and must be devised and given if their capabilities are in question. But we deal here with one who is apparently possessed of her normal physical functions. Such a person would not be expected to read from Braille or understand sign language.

No case has come to our attention which directly involves the reasonableness of writing from dictation as a literacy test for voting. But we do find that such test has been involved as a component of other unreasonable administrative requirements. The Oklahoma Constitution had a provision similar to that of N.C.G.S. 163-28. The election officials examined a school

teacher of thirty years experience, required him to read seven or eight pages of the Constitution and to write from dictation until he had written twenty-one pages. After two hours and fifteen minutes the officials ruled that he was not qualified to register. Others had similar experiences. The Supreme Court of that State declared: "The conduct of the election officers at these precincts can find no justification in the law, and their protest that they acted in good faith is refuted by their conduct." (p. 37). Further: ". . . (W)hen such proposed voter read intelligibly and wrote legibly, the section of the Constitution designated by the election officers, he demonstrated his qualifications to vote, and acts on the part of the election officers requiring him to write at great length many provisions of the Constitution, or detaining him for any great length of time under a pretense of examination, and thereby delay other persons from entering the polls, was without authority of law." (p. 36). *Snyder v. Blake*, 129 P. 34 (1912).

G. S. 163-28 does not contemplate the utmost proficiency in reading and writing sections of the Constitution. Perfection is not the measure of qualification. The standard is reasonable proficiency in reading and writing any section of the Constitution in the English language. The occasional misspelling and mispronouncing of more difficult words should not necessarily disqualify. The manner of giving the test to physically unhandicapped applicants has been indicated above. Furthermore, it is not an endurance test, and the law does not require that a prospective registrant read and write all or a major portion of the Constitution. The length of the tests should not be such as to unnecessarily delay others waiting to register. The statute imposes the duty of administering the tests upon the registrars.

"It is, of course, impracticable to lay down any very accurate test for determining the voter's ability to read and write within the meaning of the statute. In a general way, we may say it is sufficient if the voter can read in a reasonably intelligible manner . . . though each and every word may not always be accurately pronounced. On the other hand, one is able to write who, by the use of alphabetical signs, can express in a fairly legible way (the) words . . . though each and every word may not be accurately spelled." (Parentheses added). *Justice v. Meade*, 172 S. W. 678, 679 (Ky. 1915).

Quaere: May the State Board of Elections by virtue of G. S. 163-10 (2), (15), prescribe rules and regulations for administering the provisions of G. S. 163-28?

It would be unrealistic to say that the test *must* be administered to all applicants for registration. For instance, it would be folly to require professors and teachers of political science, of known and recognized capabilities, to submit to the test. The statute only requires that the applicant *have* the ability. If the registrar in good faith knows that applicant has the requisite ability, no test is necessary. But there must be no discrimination as between citizens. The test shall be administered, where uncertainty of ability exists, to all alike.

It should not be overlooked that a law though fair on its face and impartial in appearance, may be declared unconstitutional if it is administered by public authority with an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances. *Lassiter v. Northampton Election Bd.*, *supra*; *Lane v. Wilson*, 307 U.S. 268; *Williams v. Mississippi*, *supra*; *Yick Wo v. Hopkins*, 118 U.S. 356; *Davis v. Schnell*, *supra*.

We do not intimate or suggest that the registrar of Woodville Township precinct or the Bertie County Board of Elections have in any way acted in bad faith. But it is our opinion that the literacy test as administered by them is unreasonable and beyond the intent of the statute.

In summary, before a person may register for voting he or she must have the ability to read with reasonable proficiency any section from the Constitution of North Carolina, and to write in a reasonably legible hand any section of the Constitution put before him or her. Excessive reading and writing may not be required. Writing from dictation is not a requirement. The test may not be administered so as to discriminate between citizens.

Plaintiff was well advised to appeal from the decision of the registrar and to refuse the test offered by the County Board.

G. S. 163-28.1 to G. S. 163-28.3 make ample provision for appeals by rejected applicants. Upon appeal from a registrar the matter is heard *de novo* by the County Board of Elections. G. S. 163-28.2. When there is an appeal from the County Board the case is heard *de novo* in Superior Court; and appeals from Superior Court may be had to this Court. G. S. 163-28.3. Thus an applicant for registration is afforded ample opportunity to demonstrate and have adjudicated his or her qualifications for voting franchise; and under our statutes these opportunities may not be denied.

Defendant contends that plaintiff has no standing on appeal either in Superior Court or this Court for that she did not exhaust her administrative remedies. It is true that the State legislative process, administered by authorized officials and boards, must be completed before resort may be had to the courts. But G. S. 163-28.1 to G. S. 163-28.3 provide for judicial procedure. For this reason the contention is invalid. *Lane v. Wilson*, *supra*; *Mitchell v. Wright*, 154 F.2d 924 (5C 1946).

This cause is remanded to the end that the Superior Court make an order requiring the registrar of Woodville Township precinct forthwith, upon application by Nancy Bazemore, plaintiff herein, to administer to her the educational or literacy test in accordance with the provisions of G. S. 163-28 as interpreted by this opinion, and directing, if she be found qualified, that she be duly registered as of 14 May 1960. If plaintiff is found by said registrar not to be qualified for registration, she may, if so advised, employ the statutory provisions for appeal.

Error and remanded.

Parker, J. concurs in result.

EMPLOYMENT

Unfair Labor Practices—Federal Statutes

NATIONAL LABOR RELATIONS BOARD, Petitioner v. INTRACOASTAL TERMINAL, INC., and Louisiana Processing Co., Inc., Respondents.

United States Court of Appeals, Fifth Circuit, February 24, 1961, 286 F.2d 954.

SUMMARY: Upon complaint that corporate employers at Harvey, Louisiana, were engaging in unfair labor practices violative of the National Labor Relations Act, a hearing was conducted by an NLRB trial examiner. He found that, while a petition for an NLRB representation election was pending, the employers had posted a notice that, after complaints from Negro employees, they confirmed their policy of "preventing as far as possible discrimination against colored employees on the basis of color alone," and that "Effective January 1, 1958, all employees, regardless of race, will be entitled to two weeks vacation after one year of continuous service." Further, it was found that after the petitioning union had been certified, Negro employees learned in the summer of 1958 that they would receive one-week vacations as before. This unilateral repudiation of the new policy, after the selection of a bargaining agent, was found to be a failure to bargain [violating Sec. 8(a) (5) of the NLRA] and discrimination having the effect of discouraging union membership [violating Sec. 8(a) (3) of NLRA]. The NLRB agreed with the examiner's findings and conclusions, and ordered the employers to cease unilaterally changing the working conditions and from discouraging union membership by withholding paid vacations under the August, 1957, plan. It was further required that the employers "make whole" Negro employees for any loss of paid vacations resulting from the employers' violation of the NLRA. 4 Race Rel. L. Rep. 1078 (1959).

On petition of the NLRB for enforcement of its order, the Court of Appeals for the Fifth Circuit found no basis for the Board's conclusion that the change of order as to the vacation period was a violation of Section 8(a)(3). The court stated that "the Board could not possibly infer that the discrimination . . . was designed 'to encourage or discourage membership in the Union,' within the terms of that section, since it did not appear that the company had knowledge of Negro or white employees' status regarding union membership. However, the court agreed with the Board concerning Section 8(a)(1) that "this unilateral change in policy touching on vacation time . . . was not within the area of negotiations during the bargaining sessions and was therefore not a permissible activity even following the impasse." Accordingly, the court granted the petition for enforcement of the Board's order to the extent that it ordered the employers to cease and desist changing employees' vacation rights without first consulting the union, and required the employers to "make whole" Negro employees for loss of paid vacations.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and MIZE, District Judge.

TUTTLE, Chief Judge.

This case is before the court on the petition of the National Labor Relations Board for enforcement of its order against the respondents. The order is reported at 125 N.L.R.B. 31. Essentially the basic facts are not in dispute. The following recitation of them is taken from the findings of fact made by the trial examiner and approved by the Board.

"Intracoastal Terminal, Inc. and Louisiana Processing Company, Inc. are a single employer within the meaning of the Act. The former corporation is engaged at its

plant at Harvey, Louisiana, in receiving, storing and shipping oil field materials which are owned by its customers. The processing company, which is no longer in business, was engaged in grinding and processing barium sulphate at its plant which adjoined the plant of Intracoastal. Although each Respondent is a separate legal entity, they have identical officers, their stock is owned by the same persons, and their labor relations and overall policies were determined by the same individual. (p. 36).

• • • • •

" On August 26, 1957, while petitions (for election) were pending before the Board * * * the Respondents posted a notice to employees, saying that complaints had been received from the Negro employees, that a meeting of all employees had been held, and that as a result the Respondents confirmed their policy of 'preventing as far as possible discrimination against the colored employees on the basis of color alone.' The notice announced that effective immediately all employees would be eligible for bonuses on the same basis and that employees would be upgraded on the basis of ability, without regard to race * * *. The notice contained a third provision, as follows, which was not fulfilled:

"Effective January 1, 1958, all employees, regardless of race, will be entitled to two weeks vacation after one year of continuous service.

"During 1957 white employees who had been at work for a year were entitled to a paid vacation of 2 weeks. Negro employees of like service were entitled to 1 week's paid vacation. Thus, the effect of the new vacation policy, had it been carried out, would have been to double the vacation periods of eligible Negro employees.

"On the day that the above notice was posted, the Board issued its Decision and Direction of Election in the representation cases. On September 24, 1957, an election was held. Of 62 votes cast, 43 were in favor of the Union. There is no allegation or evidence that the Respondents' announced intent to end racial discrimination in employment was motivated by a desire to cause the Union's defeat in the election. Instead, as the Respondents said, they were motivated by the Negroes' complaints against the unequal working conditions.

" * * * During 1958, the white and colored employees received unequal vacations as in past years. The Respondents made no written or oral announcement that the vacation provision of the notice of August 1957 was being rescinded. The Respondents simply kept silent and it was not until the summer of 1958, when vacations were being scheduled, that the Negro employees learned that they would not receive vaca-

tions of 2 weeks. The record does not disclose the date of the Respondents' decision to repudiate the vacation provision of the notice of August 1957. Hooper, their president, testified that the Board's Direction of Election was received after the notice was posted, that he understood that any change in working conditions, whether to the employees' benefit or detriment, 'would be looked upon in the same light as some intimidation or some act of reprisal,' and that 'rather than get involved in a situation where we could be charged with trying to entice (the employees) in the election,' the Respondents decided not to carry out the new vacation policy. The quoted testimony indicates that the decision to continue a racially discriminatory vacation policy was made before the election."

The Board found that the decision of the company to rescind its vacation policy for Negro employees "was made sometime after the election," and that such decision was discriminatory in violation of Section 8(a) (3), as well as a refusal to bargain in violation of Section 8(a) (5). 29 U.S.C.A. § 158(a) (3, 5).

The next question is whether the unilateral cancellation by the respondents of their announced policy to give the Negro employees an additional week's vacation to correspond with that granted the white employees was a violation of Sections 8(a) (3) or Section 8(a) (1).

We find no basis for a conclusion that the change of order as to the vacation period was a violation of Section 8(a) (3) which, of course, prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." (Emphasis supplied.)

In *Radio Officers Union v. N. L. R. B.*, 347 U.S. 17, at page 43, 74 S.Ct. 323, 337, 98 L.Ed. 455, the Supreme Court made clear what should be apparent from the language of the Act itself. That is, "only such discrimination as encourages or discourages membership in a labor organization is prescribed." When it comes to the proof of motive, we agree with the statement recently made by the Court of Appeals for the Ninth Circuit in *Pittsburgh-Des Moines Steel Co. v. N. L. R. B.*, 284 F.2d 74, where, on page 82, it was said:

"The conclusive presumption of intent set out in *Radio Officers*' is dependent on two prerequisites. First, the encouragement or discouragement of union membership must be a natural and foreseeable consequence of the employer's discrimination. And second, the discrimination itself *must* be based solely upon the criterion of union membership. This second prerequisite is, we think, of the utmost importance."

Since it does not appear that there was any knowledge on behalf of the company as to the status of the Negro or white employees touching on Union membership, the Board could not possibly infer that the discrimination against the Negro employees was designed "to encourage or discourage membership in the Union." So far as the record shows, the Negro employees who were discriminated against may all have been non-union employees.

With respect to Section 8(a) (1), however, we agree with the Board that this unilateral change in policy touching on vacation time for a group of employees was not within the area

of negotiations during the bargaining sessions and was therefore not a permissible activity even following the impasse. It was not suggested at any time during the bargaining sessions that the Negro employees would be treated differently with respect to vacation privileges than the other employees. The change in working conditions thereafter unilaterally instituted was not permissible under the Rule laid down by this court in *N. L. R. B. v. J. H. Rutter-Rex Manufacturing Co.*, 5 Cir., 245 F.2d 594.

The petition of the Board for enforcement of the order is granted to the extent that it orders that the Respondents shall cease and desist from "changing vacation rights of employees without first consulting the Union," and to the extent that it requires the following affirmative action: respondents shall "make whole their Negro employees in the manner set forth in the action of the intermediate report entitled, 'the remedy', for any loss of paid vacations they suffered by reason of the respondents' discrimination against them."

In all other respects, enforcement will be Denied.

GOVERNMENTAL FACILITIES Golf Courses—Alabama

John H. SAWYER, et al. v. CITY OF MOBILE, Alabama, et al.

United States District Court, Southern District, Alabama, Southern Division, March 13, 1961, Civil Action No. 1999, _____ F.Supp. _____.

SUMMARY: Mobile, Alabama, Negroes brought a class action in federal district court for a declaratory judgment and an injunction restraining the city, its mayor and commissioners, and the professional manager of the municipal golf course from denying to Negro citizens use of the course on account of race. Plaintiffs also sought \$5,000 damages for having had to travel long distances to other cities to play golf because of the unavailability of golf facilities locally. A motion to dismiss was granted as to the manager because of insufficient evidence to support a verdict. On a finding that plaintiffs had been denied use of the course because of their race, the court entered an order declaring them to be entitled to such use, and enjoining defendants from denying that right to them and their class. It was held, however, that the claim for damages was not warranted by the facts.

THOMAS, District Judge.

Plaintiffs, Negro citizens of the United States and of the City of Mobile, State of Alabama, and resident taxpayers of the City of Mobile,

for themselves and other Negroes similarly situated, bring this complaint, the same being an action for declaratory judgment and for an injunction restraining the City of Mobile, its Mayor and Commissioners, and Tom Klumpp, profes-

sional manager of the Mobile Municipal Golf Course, from denying to Negro citizens, on account of race, permission to play golf on the municipal golf course; and for an injunction restraining the defendants from denying to the plaintiffs and other Negroes similarly situated the use of the municipal golf course. Plaintiffs also ask for judgment against the defendants in the sum of \$5,000 for damages.

At the conclusion of the trial, defendant Klumpp moved to dismiss the complaint as to him on the ground that the evidence failed to substantiate the complaint against him. The Court reserved its ruling on said motion.

FINDINGS OF FACT

The Mobile Municipal Golf Course is the only publicly supported golf course in Mobile, Alabama. There do exist privately owned golf courses, but none of these are owned by Negroes or open to them. Members of the Negro race are not permitted to play golf on the municipal golf course. This is a policy established by the city government. The City of Mobile owns, maintains, and operates the golf course for the exclusive use of white persons.

The plaintiffs, who at all times pertinent met all the lawful requirements necessary to play golf on the municipal golf course, and possessed the necessary equipment with which to play, presented themselves on February 24, 1958, at the Mobile Municipal Golf Course and requested permission to register and play golf on the course. This request was denied.

Subsequent to that event, the plaintiffs, through their attorney, received a letter dated March 28, 1958, from the Mayor of the City of Mobile, which stated in effect that the Mobile Municipal Golf Course was designated for the use of white persons only.

One of the City Commissioners testified that the golf course was for the exclusive use of white persons. He further testified that the City Commission was trying to obtain funds with which to construct a golf course for Negroes in Mobile,

but that this project was not foreseeable in the very near future.

The plaintiffs testified that because of the unavailability of golfing facilities in this area, they have had to travel to Pensacola, Florida, a distance of some sixty miles, and to New Orleans, Louisiana, a distance of some hundred and fifty miles, to play golf. Plaintiffs endeavor to set up as damages the expenses incurred and the inconvenience occasioned by reason of these trips.

CONCLUSIONS OF LAW

Jurisdiction of this cause is vested in the Court under the authority of 42 U.S.C.A., sections 1981, 1983; and 28 U.S.C.A., section 1343(3).

The sole question presented by this cause is whether or not these plaintiffs and other Negroes similarly situated, in being denied the opportunity to play golf on the Mobile Municipal Golf Course, have been deprived, under color or law, of their rights, privileges, and immunities as secured by the Constitution and laws of the United States. This question is not unique. It is not new. It has been resolved by the Supreme Court of the United States and the Fifth Circuit Court of Appeals. *Holmes et al. v. City of Atlanta et al.*, 350 U.S. 879; *City of Fort Lauderdale v. Moorhead et al.*, 248 F.2d 544. On the basis of these authorities, *which are binding on this court*, the plaintiffs are entitled to relief and the defendants and their agents must be permanently enjoined from denying to these plaintiffs and other Negro citizens similarly situated, because of race or color, the use of the Mobile Municipal Golf Course.

I am of the opinion that the evidence does not support a verdict against the defendant Tom Klumpp. It follows that the motion of Klumpp to dismiss should be granted.

The Court is further of the opinion that the plaintiffs' claim for damages is unwarranted under these facts.

A judgment will be entered in conformity with these findings of fact and conclusions of law.

GOVERNMENTAL FACILITIES Golf Courses—South Carolina

John H. CUMMINGS, et al. v. The CITY OF CHARLESTON, et al.

United States Court of Appeals, Fourth Circuit, April 16, 1961, 288 F.2d 817.

SUMMARY: Negro citizens of Charleston, South Carolina, filed suit in federal district court asking for an injunction against the operation of a municipal golf course on a segregated basis. The court held the statutes requiring such segregation unconstitutional and granted an injunction against segregated operation of the facilities. Since the deed under which the city held the golf course required reversion of the land to the former owners if it was not used as a golf course, and since the city anticipated difficulties in adjusting to a non-segregated operation, a delay of eight months was allowed in the effective date of the order. 5 Race Rel. L. Rep. 1137 (1960).

Plaintiffs appealed, attacking the delay as unreasonable, unsupported by any evidence demonstrating necessity, and a denial of equal protection secured by the Fourteenth Amendment. The Court of Appeals for the Fourth Circuit found from the record no evidence tending to explain the delay "for what would seem to be an unreasonable period of time" or to indicate that the injunction could not have been made immediately effective. But, since it appeared that plaintiffs' counsel had suggested below that the injunction not be operative for six months after date of the order, and more than four months from that time had already elapsed, the court remanded the case for modification of the order to make the injunction effective six months from November 26, 1960, as originally proposed by plaintiffs.

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BOREMAN, Circuit Judges.

PER CURIAM:

Appellants, Negro citizens and residents of the City of Charleston, South Carolina, as plaintiffs in a class action instituted and prosecuted on behalf of themselves and other similarly situated, sought a permanent injunction restraining The City of Charleston and other named defendants, appellees, from denying access to the recreational facility of a municipal golf course to any person for reasons of race or color. A full hearing of the controversy was held on September 7, 1960, and the decision granting the injunction was announced on November 26, 1960. However, the District Court concluded that it would be "equitable" to give the defendants a reasonable period of time for compliance and provided that the order granting injunctive relief should not be effective until eight months from and after the date of its entry. Appellants attack the "delay" of eight months as unreasonable, unsupported by any evidence demonstrating necessity and as a denial of the equal protection of laws secured to them by the Fourteenth Amendment to the Constitution of the United States.

We have searched the record and have found no evidence which would tend to explain the postponement of the effective date of the in-

junction order for what would seem to be an unreasonable period of time. We do not hold or even intimate that, if justifying circumstances were made to appear, the trial court could not exercise its sound discretion. But it is not apparent from the record that any real administrative or other problems are here involved such as are present in some of the school desegregation cases. Indeed, the record discloses nothing which would indicate that the injunction could not have been made immediately effective.

However, the unchallenged statement was made by counsel for the defendants at the bar of this court that plaintiffs' counsel tendered to the District Court a suggested form of final order which contained the provision that the injunction should not be operative until six months following the date of the entry of the order. Since more than four months have already elapsed following the entry of the final order, under the circumstances we believe that it would not be unfair or prejudicial to any of the parties involved to make the injunction effective six months from November 26, 1960, as originally proposed. It is so directed.

The case will be remanded to the District Court for modification of its order consistent with the views herein expressed.

Remanded with direction.

GOVERNMENTAL FACILITIES

Housing, Parks—Illinois

DEERFIELD PARK DISTRICT, etc. v. PROGRESS DEVELOPMENT CORPORATION, etc., et. al.

Supreme Court of Illinois, April 26, 1961, Docket No. 36207, _____ N.E.2d _____.

SUMMARY: A real estate company bought 22 acres of land in Deerfield, Illinois, an all-white suburb of Chicago, for residential subdivision development. After construction was underway, it became known in the community that the company intended to reserve about a fourth of the lots for sale to Negroes. Shortly thereafter, the city halted the construction of model houses in the subdivision, charging violation of building codes. Also, the park district started condemnation proceedings in a state court to create a public park on the subdivision site. This latter action was subsequently approved in a referendum. The company then brought suit in a federal district court against Deerfield, its officers, the park district, and a number of persons who were alleged to have instigated condemnation proceedings. Alleging a conspiracy to deprive the company of its right to hold, sell and convey real property, plaintiffs sought damages as well as an injunction. A temporary restraining order was entered against the Deerfield officials, but at a hearing on a temporary injunction, the court dismissed the action, holding that no conspiracy had been proved. 5 Race Rel. L. Rep. 427 (1960).

On appeal, the Court of Appeals for the Seventh Circuit held that the lower court correctly refused to grant a temporary injunction, since the finding that no conspiracy existed was sustained by the evidence; but the disposition of the whole case on the hearing for equitable relief was held to be in error. Plaintiffs must be given the opportunity, the court said, to attempt to prove in a jury trial that a conspiracy has taken place which entitles them to legal damages, even though they are unable to prove such a conspiracy as would entitle them to equitable relief. The court noted that no *individual* has claimed that he was denied the right to buy a home, or deprived of any other constitutional right; the only contention is that a corporation has been denied the right to make a profit. The latter charge was held to be a proper basis for a damages action, and the case was remanded to the district court for trial. 6 Race Rel. L. Rep. 222 (1961).

Meanwhile, in the state court, the company moved to dismiss the park district's condemnation proceedings on the grounds that the pending federal court action precluded the proceedings, that the condemnation was part of a conspiracy to deprive the company of its rights, that there was no public need of the property, that there was a lack of good faith, and that the action was an abuse of the power of eminent domain. Subsequently, an offer of proof by the developer was refused by the trial court on the basis of the park board's argument that the question of conspiracy and civil rights could be tried only in the federal courts, as the forum which the company itself had chosen. On appeal, the Supreme Court of Illinois held that although the company's offer of proof was prolix and frequently irrelevant, it did contain allegations sufficient to charge the park district with using its power of eminent domain "for the sole and exclusive purpose of preventing the sale of homes to Negroes." If proved, the court held, this fact would constitute a "denial of the necessary prerequisite to condemnation of necessity and public use." The trial court's action was reversed and a hearing ordered on whether the condemnation was necessary and for a public purpose.

SOLIFSBURG, J.

This is an appeal from a judgment of the trial court in consolidated condemnation cases on June 28, 1960, ordering that title to certain real estate vest in the petitioner, the Deerfield Park District, (hereinafter called Park District), upon their depositing the sum of \$168,500 with

the county treasurer of Lake County. By this appeal, defendants, Progress Development Corporation and Chicago National Bank, as trustee, (hereinafter referred to jointly as Progress), seek to set aside the judgment and overrule the motion of the Park District to strike portions of defendants' traverse or motion to dismiss. No question is raised as to the amount of just com-

pensation for the land taken which was stipulated in the trial court.

Stripped of the epithetical rhetoric of the parties the sole question before this court is the scope and extent of the issues which may properly be submitted to the trial court in a condemnation proceeding. However, a decision of this question necessitates a review of the proceedings both in the trial court and Federal courts, together with the prior history of this controversy.

Beginning in April, 1959, and subsequent thereto, Progress acquired for residential development two unimproved tracts of real estate in the village of Deerfield, Lake County, Illinois. One tract approximately fifteen acres became known as Floral Park Subdivision and the other tract of approximately seven acres, as Pear Tree Subdivision.

On July 8, 1959, the plat of Floral Park Subdivision was duly approved by the Deerfield village board. This plat was properly recorded on July 31, 1959, and provided for 39 residential lots. Thereafter, Progress commenced the installation of water, sewer and street improvements and the construction of two model homes with village board approval.

On September 16, 1959, the plat of Pear Tree Subdivision was approved by the Deerfield village board and was recorded on September 18, 1959. This plat provided for twelve home sites.

On December 7, 1959, the Deerfield Park Board took formal action to designate Floral Park and Pear Tree subdivisions as park sites and ordered that they be acquired by condemnation proceedings for park purposes. Plaintiffs rejected an offer of the Park Board to purchase these subdivisions for \$166,199.91. In the same meeting the Park Board, by proper resolutions, provided for a referendum to be held on December 21, 1959, for the purpose of submitting to the voters of Deerfield a \$550,000 bond issue, \$175,000 of which was designated for the purchase of the two subdivisions owned by Progress. The remainder of the bond issue was to cover the acquisition of four other park sites of approximately 58 acres, making a total of approximately 80 acres in the six tracts.

On December 21, 1959, the bond issue referendum was held. The election carried, and the bond issue was approved by the voters.

The following day Progress, and their present corporation, Modern Community Developers, Inc., instituted suit in the United States District

Court against the Park District, the village of Deerfield, and their respective boards, together with other individuals. The complaint alleged a conspiracy to deprive plaintiffs of their civil rights, and sought to enjoin the Park District from condemning the land; the village from unlawful enforcement of their building code; and further sought damages against all defendants. *Progress Development Corporation v. Mitchell*, 182 F. Supp. 681.

At the same time Progress and Modern sought a temporary restraining order from the United States District Court against the Park Board and the village trustees. The order was granted as to the village trustees but denied as to the Park Board. Two days later, on December 24, 1959, the Park District filed the present condemnation petition.

By agreement the condemnation proceedings were held in abeyance until hearings in the United States District Court were concluded.

On March 4, 1960, the United States District Court denied injunctive relief and dismissed the complaint of Progress and Modern and granted summary judgment thereon and they appealed.

Thereafter on March 11, 1960, Progress filed a motion to dismiss the condemnation petition on five grounds:

1. That a prior action is pending between the petitioner and one of the defendants in the United States District Court involving the same subject matter.
2. That the filing of the condemnation petition is an overt act in a conspiracy to deprive Progress of its civil rights.
3. That there is no *bona fide* public need for acquisition of this property for public use.
4. That petitioner did not negotiate or bargain in good faith.
5. That the acts of the petitioner in conspiracy with others are abuses of the power of eminent domain.

In support of the motion, Progress attached a copy of their complaint in the United States District Court. The same day the Park District moved to strike grounds 1, 2, and 5 of the motion to dismiss and filed an answer to grounds 3 and 4. The trial court granted the motion to strike grounds 1, 2 and 5 and, finding grounds 3 and 4 constituted a traverse of the petition to condemn, set the same for hearing.

Upon the hearing the Park District introduced evidence of its resolutions designating these areas as necessary park sites and authoriz-

ing their acquisition. They further proved offers to purchase and their refusal. Progress then submitted a 50-paragraph request for admission of facts which appears to have been treated below as an offer of proof. Objections thereto were sustained.

The gist of the rejected offer of proof is that Progress follows a policy of building homes for sale to Negroes and white persons; a policy first revealed to the general public on November 11, 1959. Prior to July, 1959, there were "For Sale" signs on the property; and the Park District did not contact the owner. The Park District and the local school board had many meetings with regard to school and park and swimming pool sites prior to November 11, 1959, but no discussion was had or acquisition attempted in relation to Floral Park or Pear Tree, until the public disclosure of the controlled occupancy policy of Progress.

Progress offered no further proof, and the parties stipulated as to the fair market value of the premises, and the order of condemnation was entered.

During the pendency of this appeal, the United States Court of Appeals for the Seventh Circuit, affirmed the orders of the district court denying plaintiffs' motion for a preliminary injunction; but reversed the orders and judgment dismissing the complaint and granting summary judgment thereon. The cause was remanded for a trial on the merits. The court also denied a motion for mandatory injunctive relief. *Progress Development Corporation v. Mitchell*, Doc. 12976, January 4, 1961, _____ Fed. 2d _____.

On this appeal, Progress insists that they have been denied a right to a hearing in the trial court on their charges that the present condemnation proceeding is a part of a conspiracy to deprive Progress of their civil rights.

The Park District, however, maintains that the issues of conspiracy and a denial of civil rights can only be adjudicated in the forum of Progress's choice, the Federal courts; and that the Park District sufficiently proved below the necessity for condemnation.

It is conceded, as it must be, that every private owner of property holds his title subject to the lawful exercise of the sovereign power of eminent domain, and courts may not substitute their judgment for that of the condemning authority in inquiring into the necessity and propriety of the exercise of the power. *School Trustees v.*

Sherman Heights Corp. 20 Ill.2d 357; *County Board of School Trustees v. Batchelder*, 7 Ill.2d 178.

Nevertheless the power of eminent domain, great as it is, is subject to constitutional limitations, and the courts may interpose their authority to prevent a clear abuse of the exercise of that right. *Department of Public Works and Buildings v. Lewis*, 411 Ill. 242; *City of Chicago v. Vacarro*, 408 Ill. 587; *Tedens v. Sanitary District of Chicago*, 149 Ill. 87.

It is also well settled that State power cannot be used as an instrument to deprive any person of a right protected by the Federal constitution. *Gomillion v. Lightfoot*, 362 U.S. 916, 5 L. ed. 2d 110; *Shelley v. Kraemer*, 334 U.S. 1, 92 L. ed. 1161; *Aaron v. Cooper*, 358 U.S. 3, L. ed. 2d 1.

If, therefore, the Park District's attempted exercise of the power of eminent domain would deprive Progress of equal protection of the law, it is the duty of the Illinois courts to prevent it. We do not think the resort of Progress to the Federal forum absolves the tribunals of this State from the duty of protecting their rights.

The present status of the Federal proceedings merely determines that Progress has failed to show sufficient ground for the issuance of a temporary Federal writ to stay the Illinois condemnation proceeding. There is at this time no final adjudication of the question of law regarding Progress's purported defense to condemnation.

The time was ripe to determine the validity of the defense in the trial court, and it was of necessity so determined by the judgment order.

The issues before us therefore narrow to two questions. (1) Did the stricken counts of the motion to dismiss contain allegations of fact which if proved would constitute a defense to the petition? (2) Did the offer of proof upon the traverse constitute a good defense?

We have carefully examined the motion to dismiss and the district court complaint which apparently is incorporated therein by reference. Viewed together they are replete with unsupported conclusions and voluminous allegations of fact which appear to be completely immaterial to any issue in this case. However, we think that the 42-page complaint contains allegations sufficient to charge the Park District with using its power of eminent domain for "the sole and exclusive purpose" of preventing the sale of homes by Progress to Negroes in

violation of Progress's right to equal protection of the law.

We consider such a charge, if proved, to be a denial of the necessary prerequisites to condemnation of necessity and public use, and therefore a defense to the petition.

This conclusion, however, does not mean that all, or even a substantial part of the matters alleged by Progress are material to this inquiry. We think it of no importance that the citizens of Deerfield, and even a member of the Park District board were opposed to the policy of controlled occupancy adopted by Progress. Nor is the fact that steps to acquire this land were not taken prior to Progress's announcement of its policies material here.

The material questions of fact are whether or not Deerfield needed park sites; whether or not Progress's property is suitable for park sites; and whether or not these sites will be devoted to public use. On these issues the Park District has made a *prima facie* case. *School Trustees v. Sherman Heights Corp.* 20 Ill.2d 357.

It then became incumbent upon Progress to rebut the *prima facie* case by material evidence. Progress, however, seems to argue that the facts which they have offered to prove would sufficiently rebut the Park District case. In this contention they rely on the recent case of *Gomillion v. Lightfoot*, 362 U.S. 916, 5 L. ed. 2d 110. As we have noted before, the teaching of that case is relevant here, but we think the facts are inapposite. The *Gomillion* case involved a suit for declaratory judgment by several Negroes claiming that Local Act 140 of the Alabama legislature was invalid on the ground that it deprived them of certain constitutional rights. Act 140 redefined the territorial limits of the city of Tuskegee, converting its shape from square to an "uncouth twenty-eight sided figure." All but four or five of approximately 400 qualified Negro voters were thereby excluded from the municipality while none of approximately 600 white voters were removed.

The United States Supreme Court, in striking down the redistricting, said:

"These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the leg-

islation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

"The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve."

In the case at bar, the action protested—the condemnation of land for park purposes, is a legitimate and laudable municipal function. The designation of Progress's land as a park site and its acquisition, standing alone, contains no such irresistible mathematical demonstration of illegal purpose as contained in the Alabama legislation.

In *Gomillion*, the United States Supreme Court did not engage in any metaphysical investigation into the motives of the legislators. They found the inescapable illegal purpose from the act itself. From an examination of the record in the case at bar, it is apparent that many of the allegations of Progress are framed for the purpose of directing a judicial inquiry into the motives of the individual members of the Park District Board, rather than into the actual purpose for which this land is sought. This is clearly an inappropriate area for judicial inquiry. (*Detroit United Railway v. City of Detroit*, 255 U.S. 171, 178, 65 L. ed. 570; *Soon Hing v. Crowley*, 113 U.S. 703, 710-711, 28 L. ed. 1145; *Sinclair Refining Co. v. City of Chicago*, (7th cir.) 178 F.2d 214, 217.) As we stated in *Ligare v. City of Chicago*, 139 Ill. 46, in a condemnation case the purpose for which the power of eminent domain is exercised may be questioned, but "the motives that may have actuated those in authority are not the subject of judicial investigation."

We cannot see how the rule could be otherwise. If parks are needed in Deerfield, and if the land so selected for them is appropriate for that purpose, the power of eminent domain cannot be made to depend upon the peculiar social, racial, religious or political predilections of either the condemning authority or the affected property owner. Progress is entitled to the same opportunity to hold land and operate a business as anyone else. They, like all others, hold their land subject to the lawful exercise of the power of eminent domain. They like all others are entitled to show, in a condemnation proceeding,

that the land sought to be taken, is sought not for a necessary public purpose, but rather for the sole purpose of preventing Progress from conducting a lawful business. *Cf. Progress Development Corporation v. Mitchell*, (7th cir.) Doc. 12976, folio 19, 286 F.2d 222.

In the light of these observations, we must consider the record below. We think that any proper proof on the issue of the right of condemnation could have been presented on the pleadings before the trial court on the hearing on the traverse. If by the trial court's ruling, it was intended to strike the allegation and deprive Progress of the right to prove by material facts that the exercise of eminent domain in the instant case was not necessary, and was not to be devoted to a public use, but was for the sole

purpose of depriving Progress of the right to do business, then the ruling was in error. We have carefully examined the record, and while we feel that Progress's offer of proof was in poor form, and to large degree immaterial, the colloquy in the trial court, and the briefs and argument before us indicate a restriction on the right of Progress to prove a lack of necessity and public purpose. From the record as a whole we feel that justice will be served in reversing the judgment of the trial court and remanding the cause for the sole purpose of permitting Progress a full hearing on the question of whether this taking is necessary and for a public purpose.

Reversed and remanded, with directions.

GOVERNMENTAL FACILITIES Swimming Pools—Florida

CITY OF MIAMI, FLORIDA v. Irvana A. PRYMUS and Clemmie Young.

United States Court of Appeals, Fifth Circuit, March 30, 1961, 288 F.2d 465.

SUMMARY: In a class action filed by two Negro women against the City of Miami, Florida, and named city officials, the federal district court enjoined defendants and their successors in office, agents and employees from denying plaintiffs and other Negroes the full use of a city-owned and operated swimming pool solely because of race. 5 Race Rel. L. Rep. 1150 (1960). On appeal, the Court of Appeals for the Fifth Circuit affirmed, rejecting the objections: (1) that plaintiffs had failed to exhaust their administrative remedies, because there existed no administrative remedy or procedure to exhaust; (2) that one of the two individual plaintiffs was not a city resident, because the other plaintiff was admittedly a resident; and (3) that this was not a proper case for a class suit.

Before JONES and BROWN, Circuit Judges, and CONNALLY, District Judge.

PER CURIAM.

The District Court entered a summary judgment for the plaintiffs and against the City of Miami enjoining the city from denying Negroes the use of publicly-owned swimming pool facilities solely on the ground of race. No effort is made to reargue the matters determined in *City of St. Petersburg v. Alsup*, 5 Cir., 1956, 238 F.2d 830. Only three objections are asserted here. The first, and principal one, is the failure of the plaintiffs to exhaust their administrative remedies. There is no substance to this as there

exists no administrative remedy or procedure therefor. There was thus nothing to exhaust. The second complaint asserts that one of the two individual plaintiffs was not a resident of the City, or there was a genuine dispute on this point making summary judgment unavailable. This is immaterial since the other plaintiff admittedly is a resident. The third, and last complaint, that this was not a proper case for a class suit of this kind, is likewise without merit. The order is therefore sustained and the case continues to pend before the District Court.

Affirmed.

HOUSING

Discrimination—California

Charles R. HUDSON, et ux., etc. v. Murray F. NIXON, et ux., etc.

Superior Court of the State of California, in and for the County of Merced, No. 28219, July 28, August 15, 1960.

SUMMARY: Plaintiffs, a Negro air force officer and his wife, sought to rent an apartment from defendants. Their application being rejected, plaintiffs filed suit in Superior Court, alleging that the rejection was because of race. After a trial, the court upheld plaintiffs' contentions and awarded each of them \$250 actual damages and \$250 punitive damages.

SISCHO, Judge.

It is the opinion of the Court in this case that the plaintiffs in this action were unjustly denied accommodations by the defendants because of the fact that they were colored people.

The Court further finds that the allegations of the first cause of action are true;

That each of the plaintiffs are entitled to the sum of \$250.00 damages sustained, and the further sum of \$250.00 each for the penalty set forth in Section 52 of the Civil Code of the State of California. Total judgment in favor of each plaintiff is the sum of \$500.00.

Attorney for the plaintiffs will prepare the findings and the judgment.

FINDINGS OF FACT AND CONCLUSION OF LAW

The above came on regularly for trial the 6th day of July, 1960, before the Honorable R. R. Sischo, Judge of the above entitled Court, sitting without a jury, plaintiffs appearing in person and with their counsel, Kane and Canelo, by Thomas J. Kane, Jr., and the defendants appearing in person and with their counsel, Raymond A. Arnheim, and oral and documentary evidence having been offered on behalf of both parties and the Court having taken the matter under advisement, and briefs having been filed by counsel, the Court having prepared and filed its Memorandum Opinion herein, makes the following finding of facts:

I.

That the plaintiffs, CHARLES R. HUDSON and NELLE MARGARET HUDSON, were and are now husband and wife and members of the Negro race and are American citizens; that on the 5th day of January, 1960, they had one minor child by the name of LIZA HUDSON, age, approximately seventeen (17) months.

II.

The Court further finds that at that time the plaintiff, CHARLES R. HUDSON, was a First Lieutenant in the United States Air Force, temporarily stationed at Castle Air Force Base, Merced, California.

III.

The Court further finds that at that time the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, were the owners of that certain real property at 910 East 23rd Street in the City of Merced, County of Merced, State of California, and known as the NIXON APARTMENTS, which consist of various housing and rental units.

IV.

The Court further finds that the NIXON APARTMENTS, located at 910 East 23rd Street in the City of Merced, County of Merced, State of California, were and are a business establishment in the State of California.

V.

The Court further finds that the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, did deny the plaintiffs, CHARLES R. HUDSON and NELLE MARGARET HUDSON, his wife, full and equal accommodation, advantages, facilities and privileges in and at said business establishment on account of the color and race of plaintiffs, in that on or about the 5th day of January, 1960, the defendants did refuse to rent or lease to plaintiffs certain vacant and available rental space, located in said NIXON APARTMENTS, solely on account of the color and race of the plaintiffs.

VI.

The Court further finds that a direct and

proximate result thereof, the plaintiffs were damaged in that they were forced to incur and expend the sum of \$110.00 for rental required to be paid by them during the said time.

VII.

The Court further finds that the said plaintiffs suffered humiliation, embarrassment and mental anguish as a result of such discrimination and distinction, and their damages in that connection were and are in the sum of \$195.00 each.

VIII.

The Court further finds that Section 52 of the Civil Code of the State of California, provides that the defendants, and each of them, are liable for the penalty provided by said Section in the sum of \$250.00 to each of the plaintiffs herein.

AS AND FOR FINDING THE FACTS ON THE SECOND CAUSE OF ACTION, the Court finds as follows:

I.

That the plaintiffs, CHARLES R. HUDSON and NELLE MARGARET HUDSON, were and are now husband and wife and members of the Negro race and are American citizens, and that on the 5th day of January, 1960, they had one minor child by the name of LIZA HUDSON, age, approximately seventeen months.

II.

The Court further finds that at that time the plaintiffs, CHARLES R. HUDSON, was a First Lieutenant in the United States Air Force, temporarily stationed at Castle Air Force Base, Merced, County of Merced, State of California.

III.

The Court further finds that at that time the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, were the owners of that certain real property located at 910 East 23rd Street in the City of Merced, County of Merced, State of California, and known as the NIXON APARTMENTS, which consists of various housing and rental units.

IV.

The Court further finds that as the parties have stipulated, to wit: by the pleadings and

the pre-trial conference order, that the NIXON APARTMENTS, owned by the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, were and are public housing accommodations within the meaning of Section 35710 of the Health and Safety Code of the State of California.

V.

The Court further finds that at all times herein mentioned, as established by the pleadings and the pre-trial conference order, that the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, had knowledge of the fact of such public assistance.

VI.

That on or about the 5th day of January, 1960, the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, refused to rent or lease and denied and withheld from the plaintiffs, CHARLES R. HUDSON and NELLE MARGARET HUDSON, his wife, the housing accommodations in said NIXON APARTMENTS, solely because of the race and color of said plaintiffs.

VII.

The Court further finds that the actual damages suffered by the plaintiffs, are required by Section 35720 of the Health and Safety Code of the State of California to be awarded to each plaintiff in the sum of not less than \$500.00.

CONCLUSION OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

I.

That the plaintiff, CHARLES R. HUDSON, ought to have judgment against the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, on each Causes of Action for the sum of \$500.00, but that the total amount to be awarded to the plaintiff, CHARLES R. HUDSON, ought to be in the sum of \$500.00.

II.

That the plaintiff, NELLE MARGARET HUDSON, ought to have judgment against the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, on each cause of action for the sum of \$500.00, but that the total amount

to be awarded to the plaintiff, NELLE MARGARET HUDSON, ought to be in the sum of \$500.00.

* * *

JUDGMENT

The above came on regularly for trial the 6th day of July, 1960, before the Honorable R. R. Sischo, Judge of the above entitled Court, sitting without a jury, plaintiffs appearing in person and with their counsel, Kane and Canelo, by Thomas J. Kane, Jr., and the defendants appearing in person and with their counsel, Raymond A. Arnheim, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court having been fully advised in the premises, and

having filed herein its findings of fact and conclusion of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiffs, CHARLES R. HUDSON and NELLE MARGARET HUDSON, his wife, have and recover judgment against the defendants, MURRY F. NIXON and RUTH C. NIXON, his wife, jointly and severally, the sum of FIVE HUNDRED DOLLARS (\$500.00) each, or the total sum of ONE THOUSAND DOLLARS (\$1,000.00) together with their costs of suit in the amount of ONE HUNDRED TWENTY-EIGHT AND 20/100 DOLLARS (\$128.20).

INDIANS

Jurisdiction—NLRB

NAVAJO TRIBE, a Treaty Tribe of Indians, et al. v. NATIONAL LABOR RELATIONS BOARD et al.

United States Court of Appeals, District of Columbia Circuit, March 2, 1961, 288 F.2d 162.

SUMMARY: Employees of a uranium mining firm which operated on Navajo tribal lands filed a petition under the National Labor Relations Act, asking for an election to determine union recognition. The Navajo Tribal Council intervened, contending that the National Labor Relations Board had no jurisdiction in disputes arising in Navajo tribal lands, and that, in the instant case, there was nothing "affecting commerce" within the meaning of the National Labor Relations Act. The NLRB rejected both of these contentions and ordered an election held. The shipments of uranium, even though under contract to the Atomic Energy Commission, were transported across state lines and thus were held to "affect commerce." The National Labor Relations Act was held to be congressional legislation concerning a particular field of major national policy, and expressed in such sweeping language as to include Indians and Indian reservations within its application. 5 Race Rel. L. Rep. 281 (1960). Subsequently the Tribe brought suit in the federal district court for the District of Columbia against the NLRB and three interested unions, seeking to have the Board enjoined from conducting a representation hearing. Plaintiffs contended that the NLRB lacked jurisdiction to conduct an election because (1) the Tribe which has forbidden unionization activities on the reservation has plenary authority of self-government as to tribal members and all activity conducted upon its reservation, except for express limitations thereon by the federal government, and (2) the National Labor Relations Act was not intended to apply to commerce with an Indian tribe or to interstate commerce resulting from activities located on an Indian reservation, and Congress had not exercised its constitutional powers in the Act to regulate commerce "with the Indian Tribes." The court concluded that (1) the operations of the plan on the Tribe's reservation affect interstate commerce within the meaning of the National Labor Relations Act, (2) the provisions of the Act authorizing the Board to conduct representation proceedings are applicable to the plant herein involved, and (3) the com-

plaints fail to state claims warranting relief. On appeal, the Court of Appeals for the District of Columbia Circuit affirmed on the ground that the NLRB had jurisdiction to enter the election order. Stating that Congress had adopted a national labor policy superseding the local policies of the states and Indian tribes in all cases to which the Act applies, the court held that the Act applies to the mining firm herein because it produces goods for interstate commerce, that labor disputes in its plants would affect commerce within the Act's terms, and that the location of the plant on the reservation does not remove it or its employees (Indians or otherwise) from the Act's coverage. The court pointed out that it was not necessary for Congress to rely on its power to regulate commerce with the Indian tribes, as reliance on its interstate commerce power is ample to sustain its mandate.

Before MAGRUDGER, Senior United States Circuit Judge for the First Circuit, and PRETTYMAN and WASHINGTON, Circuit Judges.

WASHINGTON, Circuit Judge.

This case presents the question whether the Navajo Tribe of Indians is entitled to an injunction preventing the National Labor Relations Board from holding a representation election in a mining plant located on the Navajo Reservation. Suit seeking that relief was brought in the District Court by the Tribe and one of its members against the Labor Board, its members, and three interested unions. The corporation owning the plant intervened as a party plaintiff. Plaintiffs moved for a preliminary injunction; defendants moved for dismissal of the complaint. The court granted the defendants' motion and denied that of the plaintiffs. This appeal followed.

The District Court's principal findings of fact are as follows:

"1. Plaintiff-intervenor Texas-Zinc Minerals Corporation operates a uranium concentrate mill at Mexican Hat, Utah within the Navajo reservation and annually ships materials in excess of \$5,000,000 in value from the Company's plant to the Atomic Energy Commission's receiving station in Colorado. This Company is party to a twenty-five year lease with plaintiff Navajo Tribe covering the land on which the mill is located, which lease was executed in 1956. About 87 persons, of whom 47 are members of the Navajo Tribe and 40 are non-Indians, are employed at the mill.

"2. On May 12, 1959, the United Steelworkers of America, AFL-CIO filed a petition with the Board under Section 9(c) of the National Labor Relations Act requesting that an election be held to determine whether the Texas-Zinc Minerals Corporation's employees wished to be represented by it for collective bargaining purposes.

"3. At the representation hearing before the Board, the Navajo Tribe intervened specially for the purpose of contesting the Board's jurisdiction in the proceeding. The Company, the Steelworkers, and two other unions which intervened in the case, International Union of Operating Engineers, AFL-CIO and International Hodcarriers, Building and Common Laborers Union of America, participated at the hearing.

"4. On February 11, 1960, the Board issued its Decision and Direction of Election in which it determined that the Board has jurisdiction under the Act to administer its provisions with respect to interstate businesses located on the Navajo reservation, and particularly that the Board had such jurisdiction in the case before it, and directed that a representation election be held as requested by the Steelworkers' petition.

"5. On March 23, 1960, plaintiff instituted the instant suit for the purpose of enjoining the Board from conducting a representation hearing. The gravamen of the complaint is that the Board lacks jurisdiction to conduct an election because (1) the Navajo Tribe has plenary authority of self-government with respect to the members of its Tribe and as to all activity conducted upon its reservation, except to the extent that the federal government has expressly limited such authority, and that pursuant to its power of self-government the Tribe has enacted resolutions forbidding all unionization activities on its reservation, and (2) the National Labor Relations Act was not intended to apply to commerce with an Indian Tribe or to interstate commerce resulting from business activities located on an Indian reservation, nor did Congress exercise its constitutional power in the National Labor

Relations Act to regulate commerce 'with the Indian tribes.'

"Following the filing of the complaint Texas-Zinc Minerals Corporation filed a motion to intervene as plaintiff, and attached thereto its proposed complaint in which it requested, in its prayer for relief, only that the representation election be enjoined until final judicial determination of the issues raised by the pleadings in the proceeding before this Court."

The District Court also stated the following conclusions of law:

"1. The operations of Texas-Zinc Minerals Corporation's plant located on the Navajo Tribe's reservation, as described in the complaint herein, affect interstate commerce within the meaning of the National Labor Relations Act.

"2. The provisions of the National Labor Relations Act, including *inter alia* the provisions which authorize the Board to conduct representation proceedings, are applicable to the Texas-Zinc Minerals Corporation plant involved in this case, and the Board is accordingly authorized to entertain the petition described in the complaint herein for a representation election among the employees of such plant.

"3. The complaints of plaintiffs Navajo's Tribe and intervenor Texas-Zinc Minerals Corporation fail to state claims warranting relief."

The quoted findings of fact by the District Court are not substantially questioned by appellants. The conclusions of law, however, are vigorously assailed. Appellants' central contentions are that under the Treaty of June 1, 1868, 15 Stat. 667, between the Navajo Tribe and the United States, the Tribe has broad powers of self government, including the right to exclude outsiders;¹ that the decision of the Tribal Council

to prevent union activity on its Reservation was within its authority; and that the National Labor Relations Act should not be construed in a way which would conflict with the Treaty and the Tribe's rights under it.

Forceful as these contentions are, we are constrained to disagree. When the Treaty of 1868 was adopted, tribal control of such labor problems as may then have existed on the Tribal Reservation may well have been expected, at least to the exclusion of interference by the several States.² Since then, however, Congress has adopted a national labor policy, superseding the local policies of the States and the Indian tribes, in all cases to which the National Labor Relations Act applies. Here, the Act clearly applies to the Texas-Zinc Minerals Corporation, the employer-intervenor, because it is engaged in the production of goods for interstate commerce, and labor disputes in its plants would clearly "affect commerce" within the meaning of the Act.³ The circumstance that the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from the coverage of the Act. Compare *Cherokee Nation v. Southern Kansas Ry. Co.*, 1890, 135 U.S. 641, 656, 10 S.Ct. 965, 34 L.Ed. 295; *Federal Power Commission v. Tuscarora Indian Nation*, 1960, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584.⁴

The Tribe says that Congress in the National Labor Relations Act did not rely on, or purport to exercise, its power to regulate commerce "with the Indian Tribes," Constitution, Article I, Section 8, Clause 3, and that hence such commerce remains unregulated by the Act. But it is doubtful that commerce with an Indian tribe

orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article." 15 Stat. 668.

2. Compare *Worcester v. Georgia*, 1832, 6 Pet. 515, 31 U.S. 515, 8 L.Ed. 483; *Williams v. Lee*, 1959, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251.

3. The Tribe contests this, but we think it is plainly mistaken, in view of Finding of Fact No. 1 quoted above, not here disputed. See Sections 9(c), 2(6) and 2(7) of the Act.

4. The decision in *Elk v. Wilkins*, 1884, 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643, whatever its present-day significance, certainly does not operate to remove "Indians and their property interests" from the coverage of a general statute. See *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. at page 116, 80 S.Ct. at page 553. The National Labor Relations Act is a general statute. Its jurisdictional provisions, and its definitions of "employer," "employee," and "commerce" are of broad and comprehensive scope.

1. The Treaty provision mainly relied on by appellants is the following:

"The United States agrees that [the Reservation] . . . shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the

is involved in this case at all.⁵ The Board regulates labor disputes affecting interstate commerce, and the Act authorizes it to do so without stating any exception which would preclude its acting with respect to a plant located within an Indian reservation, or one employing Indians. Congress need not cite or purport to rely on all its powers, when reliance on a single power is ample to sustain its mandate. Nor is its failure to mention its power over commerce with the Indian tribes any indication that it intended to

narrow its action with respect to interstate commerce in the manner suggested by appellants.

We conclude that the Board had jurisdiction to enter its challenged order, directing an election. Questions as to the wisdom of the Board in entering the order are not for the courts to decide, and we express no opinion about them. The judgment of the District Court⁶ will be Affirmed.

5. Compare *United States v. Forty-Three Gallons of Whiskey*, 1876, 3 Otto 188, 93 U.S. 188, 23 L.Ed. 846; *United States v. Holliday*, 1865, 3 Wall. 407, 70 U.S. 407, 18 L.Ed. 182; *Ex parte Webb*, 1912, 225 U.S. 663, 32 S.Ct. 769, 56 L.Ed. 1248.

6. No party to this appeal contends that the District Court lacked jurisdiction over the litigation. Since the suit was one which challenged the Board's determination as being in excess of the Board's powers, and a justiciable question of statutory construction was raised, jurisdiction clearly existed. See *Leedom v. Kyne*, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 110.

ORGANIZATIONS NAACP—Alabama

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE v. MacDonald GALLION, Attorney General of Alabama, et al.

United States Court of Appeals, Fifth Circuit, May 15, 1961, No. 18576, 290 F.2d 337.

SUMMARY: The Attorney General of Alabama brought suit in an Alabama state court to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws requiring registration of foreign corporations. A temporary restraining order was issued against the association. 1 Race Rel. L. Rep. 707 (1956). Later the court ordered the association to produce certain books, papers, and documents, including a membership list; and, on refusal to produce the latter, the association was adjudged in contempt and fined. 1 Race Rel. L. Rep. 917 (1956). After extended litigation in which the case was twice carried to the United States Supreme Court, the contempt conviction was reversed, and the cause remanded to the state circuit court for determination on the merits. (For a summary of these proceedings, see 5 Race Rel. L. Rep. 809). Meanwhile, the association filed an action in a federal district court in Alabama alleging jurisdiction in that court to redress the deprivation by Alabama state officials of a right, privilege, or immunity secured to the association and/or its members by federal constitutional and/or statutory provisions for equal rights of citizens and to redress a deprivation of its equal rights and protection under the law as provided by the federal Civil Rights Act. Following the remand by the state supreme court to the circuit court, defendants in the federal court action filed a motion to dismiss. While holding that there was no serious question about its jurisdiction to entertain the instant suit, the latter court decided not to exercise jurisdiction, when, as here, an action is "in the breast of a state court," and one of the litigants seeks to invoke the injunctive powers of the federal tribunal. Assuming that the state officials would observe their oaths to protect the constitutional rights of all citizens, the court denied the association's motion for a preliminary injunction and dismissed the action. 5 Race Rel. L. Rep. (1960).

On appeal, the NAACP contended that the infringement of the constitutional rights suffered by it and its members could be redressed only by the federal court exercising its jurisdiction, hearing the case on the merits, and granting the requested injunction. The Association

argued that because the public officials of Alabama, including the judiciary, are committed to a policy of maintaining segregation at all costs, its "remedy in the State courts is not merely inadequate, it is non-existent." The Court of Appeals for the Fifth Circuit, however, refused to assume that the state and its officers would not give effect to federally guaranteed rights of litigants with reasonable dispatch, and held that this was a proper case in which to apply the doctrine of abstention by the federal courts until the state courts had been afforded a reasonable opportunity to pass upon the asserted rights of the state to oust the NAACP and of the NAACP to qualify as a foreign corporation in the state. But the appellate court also held that the district court should not have entered an order of dismissal, but rather should have retained jurisdiction in order to protect the association in this action or in supplemental proceedings, and in order to take such steps as might be required justly to dispose of the litigation should a state court determination not be reached promptly. Therefore, the judgment was vacated and the case remanded with instructions that the district court retain jurisdiction (federal questions having been raised by the complaint) while permitting state courts expeditiously to determine the issues presented. One judge dissented in part.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and MIZE, District Judge.

JONES, Circuit Judge.

In 1956 the Attorney General of Alabama brought suit in the Circuit Court of the 15th Judicial Circuit of Alabama, Montgomery County, against the National Association for the Advancement of Colored People, herein referred to as NAACP, a New York corporation, asserting that it was doing business in Alabama without qualifying as a foreign corporation, and seeking to enjoin it from conducting business and from exercising any of its corporate functions in the State of Alabama. On June 1, 1956, the day the bill of complaint was filed, the Alabama Circuit Court issued its Temporary Restraining Order and Injunction which prohibited the NAACP from conducting business, and from making application to qualify to do business, in Alabama. A demurrer to the bill was filed by NAACP, which also filed a motion to dissolve the restraining order. Before this motion was heard the State moved for the production of a large number of records and papers, including the records showing the names and addresses of the Alabama members and agents of NAACP. The court, after a hearing, entered an order requiring the NAACP to produce records and papers, including the records of its members and postponed the hearing on the motion to dissolve.

The NAACP then answered and admitted it had carried on activities and had established an office in Alabama. It denied that it was required to qualify as a foreign corporation but offered, if permitted, to do so. The production order was not complied with and for its failure the NAACP was adjudged in contempt by an order

which imposed a fine of \$10,000, and provided that the fine might be reduced or remitted if production was made in five days but otherwise would be increased to \$100,000. The NAACP complied, so it later contended, with the order to produce in all respects except as to the names of its members. It contended that it was protected by the United States Constitution from the making of this disclosure. A modification of the restraining order and a stay pending appeal were sought and denied. An application for a stay order was made to the Supreme Court of Alabama. While this application was pending the Circuit Court made a further contempt order and increased the fine to \$100,000. The NAACP was not permitted, it seems, under the law of Alabama, to have a hearing on its motion to dissolve the restraining order until it had purged itself of contempt. The Supreme Court of Alabama refused to review the contempt judgment. *Ex parte National Association for the Advancement of Colored People*, 265 Ala. 699, So. 2d 221; *Id.* 265 Ala. 349, 91 So. 2d 214.

The Supreme Court of the United States granted certiorari and held that, on the record before it, the State could not require the production of the names of members and that the fine for contempt must fall. *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488. The NAACP, in addition to asserting a constitutional immunity from disclosing the names of its members, attempted to challenge the validity of the restraining order. The Supreme Court declined to consider this question, saying:

"The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here." 357 U.S. 449, 466.

The Supreme Court of Alabama, on the remand from the Supreme Court of the United States, "again affirmed" the contempt judgment on the ground that the United States court had been mistaken in considering that the NAACP had complied with the production order except for refusal to produce its membership lists. *Ex parte National Association for the Advancement of Colored People*, 268 Alabama 531, 109 So. 2d 138. In a per curiam opinion, the Supreme Court of the United States held that the State was precluded from making the contention that the NAACP had failed to comply with the production order otherwise than with respect to the records of its membership. The judgment of the Supreme Court of Alabama was reversed. *National Association for the Advancement of Colored People v. Alabama*, 360 U.S. 240, 79 S.Ct. 1001, 3 L.Ed. 2d 1205. The NAACP had applied to the Supreme Court of the United States for a writ of mandamus to compel the Supreme Court of Alabama to comply with the mandate in the earlier case. This was decided in the same opinion as that dealing with the contempt judgment. The court refused to issue a writ of mandamus. In the concluding paragraphs the court said:

"Upon further proceedings in the Circuit Court, if it appears that further production is necessary, that court may, of course, require the petitioner to produce such further items, not inconsistent with this and our earlier opinion, that may be appropriate, reasonable and constitutional under the circumstances then appearing.

"We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings, 357 U.S. at 466, 467, and, therefore, deny petitioner's application in No. 674, Misc., [NAACP v. Honorable J. Ed Livingstone, Chief Justice of the Supreme Court of Alabama, et al.] for a writ of mandamus." 360 U.S. 240, 245.

This decision of the Supreme Court became final upon the denial of a petition for rehearing on October 12, 1959. In response to the efforts of the NAACP to get the Supreme Court of Alabama to send down its mandate to the Circuit Court, the Clerk of the Alabama Supreme Court advised counsel for the NAACP "that this case will receive attention as soon as practicable, commensurate with the rest of the important business of the court." The cause in the United States District Court for the Middle District of Alabama resulting in the judgment from which this appeal was taken was commenced by the filing of a complaint by the NAACP on June 23, 1960. On July 11, 1960, the Supreme Court of Alabama remanded to the Circuit Court the cause remanded to it by the Supreme Court of the United States. In its order the Supreme Court of Alabama directed that the temporary injunction remain in full force pending final determination of the cause on the merits. *Ex parte National Association for the Advancement of Colored People*, Ala., 122 So. 2d 396.

Meanwhile there was other activity in the State Circuit Court. On April 9, 1958, the State filed a petition charging a violation of the restraining order by organizing or controlling the Alabama State Coordinating Association for Registration and Voting, which association was, the State asserted, a device and subterfuge to cover and hide operations by the NAACP which were enjoined by the restraining order. The State prayed that the NAACP be required to show cause why the NAACP should not be held in contempt for violating the restraining order by reason of this conduct. The NAACP filed a motion to dismiss the petition, primarily on jurisdictional grounds. We are not informed of any ruling on the motion to dismiss. In February 1960, while the original contempt matter was in the Supreme Court of Alabama with its mandate to the Circuit Court deferred because of other "important business of the court," the State propounded to the NAACP forty-two interrogatories with respect to its connection with the Alabama State Coordinating Association for Registration and Voting. We are not informed as to whether these interrogatories have been either answered or made the subject of objections or other attack.

In the complaint filed by the NAACP in the Federal District Court against the Attorney General and the Secretary of State of Alabama,

it is asserted that the legal proceedings brought against it in the State Court are arbitrary and vindictive and hence in violation of due process of law, that no other action has been taken to oust from the State a foreign corporation which had failed to register and the discrimination against it was because of its promotion of equal rights and the eradication of distinctions based upon race. It is alleged in the complaint that, without a hearing, the NAACP was required to close its office in Birmingham, that it suffered the loss of membership and income from members and contributors in Alabama, and that its members are deprived of the right of voluntary association and the right to seek the privileges guaranteed by the Constitution and laws of the United States. An injunction was sought to restrain the Attorney General from proceeding to enforce the State Court restraining order or taking any other action to oust the NAACP from Alabama, and to enjoin the Secretary of State from refusing to register the NAACP as a foreign corporation. There was also a prayer to enjoin interference with the legal and constitutionally protected rights of the NAACP and its members.

The Attorney General and the Secretary of State moved to dismiss on the ground that the federal court lacked jurisdiction, and that the contempt matter was, pursuant to the mandate of the Supreme Court of Alabama, again in the Circuit Court. The district court granted the motions to dismiss and, in an opinion filed on August 11, 1960,¹ set forth the principles which it felt were decisive of the questions presented. The district court had no doubt but that federal jurisdiction might here be invoked to redress the deprivation of rights, privileges, or immunities guaranteed by the Constitution or laws of the United States. It was the view of the district court, however, that it should not, under the circumstances, exercise that jurisdiction. The reasoning of the district court was thus expressed:

"The real basis for plaintiff's seeking this Court's aid is the alleged unconstitutional action by the Courts of Alabama in not proceeding promptly; but the effect of the delayed action and 'dilatatory tactics' is to deprive the plaintiff-corporation of its constitutional right to do business in the State of Alabama and to do so without the plain-

tiff-corporation having the right to obtain rulings upon and, if necessary, a review of those rulings upon the several constitutional issues raised.

"It should be noted that in this case the Supreme Court of the United States refused to pass on the constitutional issues raised by this plaintiff-corporation. The Court there said that the constitutional issues were not properly before it, and remanded the case to the state Courts for further proceedings. *N.A.A.C.P. v. Alabama*, supra, [357 U.S. 449]. In making this determination, the Supreme Court recognized that the ultimate aim and purpose of the litigation is to determine the right of the State to enjoin petitioners from doing business in Alabama.

"It should also be noted that the Supreme Court in its last treatment of this litigation even went so far as to indicate to this plaintiff-corporation the route open to it in securing a prompt trial and review if appropriate.

* * *

"If this assumption as made by the Supreme Court was or is erroneous, the proper remedy in this particular case is to that Court by regular appellate procedures or extraordinary procedures ancillary to the prior remand.

"In addition to the above, it must be recognized that there are certain instances when a federal Court should not exercise its jurisdiction, and this is particularly true in a case where an action is in the breast of a state Court and one of the litigants in that case seeks to invoke the injunctive powers of the federal Court. *Stefanelli v. Minard*, 342 U.S. 117, and the authorities therein cited.

"This Court must and does now assume that the public officials for the State of Alabama (the judicial officers concerned with the case now pending in the state Courts, as well as the two officers that are parties to the present litigation) recognize that they are just as solemnly committed by their oaths taken pursuant to Article VI, Clause 3, of the Constitution of the United States to protect the constitutional rights of all citizens, as is this Court. It would be necessary for this Court to assume otherwise in order to justify granting plaintiff the relief it seeks."

1. *NAACP v. Gallion*, Attorney General of the State of Alabama, 190 F. Supp. 583.

The appellant, the NAACP, states its specification of error in an unusual but adequate way by stating that, "The District Court erred in failing to recognize that the infringement of constitutional rights suffered by appellant and its membership can be redressed only by the federal court exercising its jurisdiction, hearing this case on the merits, and granting the requested injunction prohibiting appellees from further barring appellant from conducting its lawful activity within the State of Alabama." It is stated on behalf of the NAACP, in its brief and argument, that the public officials of Alabama, including its judiciary, are committed to a policy of maintaining racial segregation at all costs, including, if need be, defiance of federal authority. The NAACP is, so its says, a prime object of attack by the officials of Alabama. To persuade us of this so-called "Climate in Alabama" the NAACP inserts in its brief some thirty references to and quotations from Southern School News. We are unable to take judicial notice either of these excerpts or of the facts which they purport to relate. We are not convinced that we must say, as the NAACP insists, that its "remedy in the State courts is not merely inadequate, it is nonexistent." The Supreme Court has suggested that "The proper method for raising questions in the State appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal," say the Supreme Court, "can review be sought here." The Supreme Court and the district court have assumed that the Alabama courts will proceed in the discharge of their duty to decide this litigation with reasonable dispatch. It is implicit in the assumption of the Supreme Court and expressed in the assumption of the district court that the State of Alabama and its officers, judicial as well as executive, will recognize and give effect to the federally guaranteed rights of litigants before its courts. We do not think we should indulge in a different assumption. If, as the NAACP fears, the Alabama courts render a judgment which deprives it of a constitutional right, the judgment may be reviewed and corrected by the Supreme Court of the United States. If, as the NAACP suggests as probable, the Alabama courts raise or sanction unjustifiable barriers to a determination of issues, or resort to other deliberate judicial foot-

dragging, the NAACP will not be, as we will point out, deprived of a remedy.

The Supreme Court has, on many occasions, stated the principle that federal courts should refrain from determining constitutional questions arising from the interpretation and application of state statutes until the state courts have been afforded a reasonable opportunity to pass upon them. We think this is a case to which the stated principle applies. The NAACP is a New York corporation and does not deny that it has been doing business in Alabama without qualifying under State laws as a foreign corporation, although protesting that qualification is not required of it. The right, asserted by the State to oust NAACP and the right, asserted by NAACP, to qualify as a foreign corporation in the State, are matters which should be first litigated in the State court. In *Harrison, Attorney General v. National Association for the Advancement of Colored People*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed. 2d 1152, abstention was directed although the case involved a Virginia statute which the district court found was enacted to impede school integration and nullify the effect of *Brown v. Board of Education*. More reason here exists, we think, for giving the State courts an opportunity for determining the questions than were present in the Harrison case.

We entertain no doubt but that the district court had jurisdiction to entertain a complaint seeking an injunction against officers of a state to prevent the deprivation of or interference with a right created or guaranteed by the United States. But this should not be done unless there is a danger of irreparable injury which is imminent. *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927. Only manifest oppression will justify the interference by a federal court with state administrative officers acting under color of office in a good faith effort to perform their duties. *Hawks v. Hamill*, 288 U.S. 52, 53 S.Ct. 240, 77 L.Ed. 610. There must be an exceptional circumstance and a clear showing of a necessity for the protection of constitutional rights for an injunction to justify interference by the issuance of the writ. *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322. Such a necessity appeared in *City of Houston v. Jas. K. Dobbs Co.*, 5th Cir. 1956, 232 F.2d 428. The judicial doctrine of abstention, invoked in cases such as this, is in keeping with the spirit, although not required

by the letter, of the Anti-Injunction Act.² This principle is exhaustively explored in *T. Smith & Son, Inc. v. Williams*, 5th Cir. 1960, 275 F.2d 397, and need not be further discussed here.

The district court entered an order of dismissal. This it should not have done. Jurisdiction should have been retained so that in this action or in such supplemental proceedings as may be initiated the appellant may be protected, as in the Harrison case; and to take such steps as may be required for the just disposition of the litigation should anything prevent a prompt state court determination as was provided in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed. 2d 1058, reh. den. 360 U.S. 940, 79 S.Ct. 1442, 3 L.Ed. 2d 1552. See also *Martin v. Creasy*, 360 U.S. 219, 79 S.Ct. 1034, 3 L.Ed. 2d 1186; *County of Allegheny v. Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed. 2d 1163; *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 79 S.Ct. 455, 3 L.Ed. 2d 562.

The situation here is not, we think, comparable with that presented in *Hawkins v. Board of Control*, 5th Cir. 1958, 253 F.2d 752. There Hawkins, a Negro, had been unsuccessfully attempting to obtain admission to the University of Florida Law School.³ In its opinion reported in 350 U.S. 413, the Supreme Court held that Hawkins was entitled to admission under the rules and regulations applicable to other qualified candidates, and the cause was remanded. The Supreme Court of Florida, quoting from Washington's Farewell Address, and undertaking to exercise a judicial discretion, denied Hawkins the right to enter the University and gave him the privilege of renewing his motion if he could show that his admission could be accomplished without doing great public mischief. The Supreme Court denied certiorari without prejudice to Hawkins' right to seek relief in an appropriate United States district court. 355 U.S. 839. Hawkins instituted suit in a district court seeking admission to the school

on the same basis as other qualified candidates. The district court refused to receive evidence on Hawkins' application for a preliminary injunction and denied the injunction. This Court reversed and directed a prompt hearing. *Hawkins v. Board of Control*, 5th Cir. 1958, 253 F.2d 752. No question of abstaining to permit further state court litigation was in the case.

We are in agreement with the district court's decision that this matter should be litigated initially in the courts of the State. But for the reasons here set forth, the judgment will be vacated and the case remanded to the district court with instructions to permit the issues presented to be determined with expedition in the State courts, retaining jurisdiction meanwhile for the purposes here stated. The conclusions which we have stated are not to be regarded as holding or suggesting that each of the matters alleged in the complaint would constitute, if proven, a violation of a right which is protected by the Federal Constitution or congressional enactments. We do hold that federal questions are raised by the complaint.

VACATED AND REMANDED.

Opinion by Tuttle

TUTTLE, Chief Judge, CONCURRING IN PART AND DISSENTING IN PART.

With deference to the views of my colleagues, I must dissent from that part of the opinion that affirms the action of the trial court in not proceeding to hear the case presented to it on the merits. I, of course, concur in all the propositions of law which are so well stated in the Court's opinion. My disagreement arises from the fact that the history of the litigation in the state courts has demonstrated that at the time of the filing of the within complaint the state courts were not affording the complainant reasonable opportunity to be heard on the merits of its complaint that it was being illegally deprived of its right to qualify as a foreign corporation under the Alabama laws.

The nub of the majority opinion I think is contained in the following statement:

"The Supreme Court has, on many occasions, stated the principle that Federal Courts should refrain from determining constitutional questions arising from the interpretation and application of state statutes until the state courts have been afforded a

2. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C.A. § 2283.
3. *Hawkins v. Board of Control*, 47 So. 2d 608; Id. 53 So. 2d 116, cert. den. 342 U.S. 877, 72 S. Ct. 166, 96 L. Ed. 659; Id. 60 So. 2d 162, rev. 347 U.S. 971, 74 S. Ct. 783, 98 L. Ed. 1112, 350 U.S. 413, 76 S. Ct. 464, 100 L. Ed. 486, Id. 83 So. 2d 20, cert. den. 350 U.S. 413, 76 S. Ct. 464, 100 L. Ed. 486; Id. 93 So. 2d 354, cert. den. 355 U.S. 839, 78 S. Ct. 20, 2 L. Ed. 2d 49.

reasonable opportunity to pass upon them. We think this is a case to which the stated principle applies."

I think, with all deference, that this is a case to which the stated principle does *not* apply.

The Supreme Court, as pointed out in the majority opinion, in denying appellant's petition for mandamus said:

"We assume that the State Supreme Court, thus advised, will not fail to proceed promptly with the disposition of the matters left open under our mandate for further proceedings." 360 U.S. 240, 245.

The assumption thus made by the United States Supreme Court has now clearly been proved to be incorrect. This record shows that although the Supreme Court of the United States finally disposed of the matter by a denial of a petition for rehearing on October 12, 1959, and in spite of efforts by the appellants to get the Supreme Court of Alabama to send down its mandate to the state trial court, the Alabama Supreme Court had failed more than eight months later to perform this simplest of ministerial acts, that is, to send down the mandate to the Circuit Court. In the meantime appellant was denied any opportunity to move towards a trial of the validity of the original injunction, already in effect for three years. No effort was made upon the hearing below to show how such an unparalleled delay in the performance of a normal clerical duty was justified. In the absence of such justification, I think that there is but one conclusion possible; the State Supreme Court *did* "fail to proceed promptly with the disposition of the matters left open under [the United States Supreme Court] mandate for further proceedings," thus removing the basis assigned by that Court for its refusal to grant appellant's application for a writ of mandamus.

In such circumstances as this, I think the course of litigation in *Hawkins v. Board of Control*, the history of which is portrayed by the

citations of its appearance in the Florida courts and the United States Supreme Court in footnote 3 of the majority opinion, teaches us that the matter is ripe for decision by a United States District Court. In the Hawkins case, the question of the admission of Hawkins to the University of Florida law school was pending in the State Supreme Court, following a decision of the United States Supreme Court holding that no further basis appeared for denying him such admission. Following another denial of his admission by the State court, which expressly retained jurisdiction, Hawkins applied to the United States Supreme Court for certiorari. The Supreme Court denied the application for certiorari "without prejudice to the petitioner's seeking relief in an appropriate United States District Court."

The United States Supreme Court thus not only approved, but itself suggested, a procedure for permitting a complainant who considered that he was being shunted aside for inordinate delays in the State courts to have the matter inquired into on the merits in a United States District Court.

In this case, I would have not the slightest doubt that the failure of the Alabama Supreme Court to make possible further proceedings in that State's trial court by its failure to take the simple ministerial act of sending down the mandate for a period of more than eight months, and then sending it down only after suit was filed in the United States Court, presented a classic example of a case in which the assumption that the State court would act promptly to permit a trial of the rights of an aggrieved party has been demonstrated to be false.

I, of course, agree that the judgment of dismissal must be reversed and set aside. I disagree with my colleagues only in that I think the trial court should have proceeded to a hearing on the merits of the complaint, requiring the appellant to participate further in the fiction that it had an opportunity to have a reasonably prompt hearing in the State courts.

PUBLIC ACCOMMODATIONS Cemeteries—Minnesota

Ramona W. ERICKSON and David E. Erickson v. SUNSET MEMORIAL PARK ASSOCIATION, Inc.

Supreme Court of Minnesota, March 24, 1961, 108 N.W.2d 434.

SUMMARY: Representing themselves to be Caucasians, a Caucasian man and his American Indian wife purchased a burial lot from a Minnesota cemetery corporation having a rule restricting ownership or use of burial space to Caucasians. Conforming to the corporation's practice of some 30 years, the lot was conveyed to the applicants by a warranty deed containing a covenant restricting the lot's use to interment of deceased Caucasians. Subsequently, the corporation notified the wife that it could not permit the interment of non-Caucasians and would not permit the lot's use for her burial. The couple sought a state court adjudication of their right so to use the lot. It was held that the restrictive covenant in the deed and the corporation's policy upon which that covenant was based were contrary to the state's public policy as evidenced in legislation enacted in 1953 and 1957, prior to the events of this case. Public policy therefore prohibiting such racial discrimination, the court held that the couple's representation of the wife as a Caucasian, though contrary to fact, was not a material representation relating to an essential fact in the contract so as to justify a cancellation or a rescission on the grounds of unilateral mistake, or of fraud if it were a deliberate misrepresentation. 5 Race Rel. L. Rep. 186 (1959). On appeal, the state supreme court affirmed, holding that the state statute making unlawful any covenants in a writing relating to real estate which discriminate against a class of persons because of religion, race or color, applies to render void the restrictive covenant in the deed involved herein. The court rejected the contention that this statute, along with the "accommodation statute," is a civil rights statute concerned only with property rights of living persons, and ruled that plaintiffs' property rights in the cemetery land were an interest in real estate within the purview of the statute. The trial court's reasoning in overruling defendant's argument that plaintiffs' fraud justified cancellation or rescission was also endorsed.

MURPHY, Justice.

Syllabus by the Court

1. In view of the fact that the issue relating to asserted denial of equal protection of the laws can be determined by interpretation of the constitution, statutes, and public policy of Minnesota, it is not necessary for this court to reconcile or evaluate decisions of the Supreme Court of the United States relating to rights under U.S. Const. Amend. XIV, which decisions are not entirely clear as to whether judicial determination of the rights of private parties to a contract containing discriminatory provisions as to race amounts to unconstitutional state action.

2. A covenant in a deed to a cemetery lot in a public burial ground, issued to an American of Indian extraction, which provides that the lot shall be used only "for the interment or burial of deceased persons of the Caucasian race" is void under the provisions of Minn.St. § 507.18.

3. Whether a lot to a cemetery be considered

a special kind of conditional estate in fee, a perpetual easement, or a kind of perpetual license, it is in any event an interest in real estate within the purview of § 507.18.

4. The right of burial in a private religious or fraternal cemetery derives from membership. While § 507.18 has application to deeds to cemetery lots executed by a cemetery operating a public burial ground, its provisions do not apply to private cemeteries operated by religious or fraternal corporations. This court may assume that in enacting § 507.18 the legislature acted with knowledge of the full scope of its constitutional powers and of prior legislation on the same subject and that it did not intend to overthrow long-established civil rights by including within the provisions of the statute a purpose or object hostile to long-established religious practice.

5. By L.1957, c. 953, the legislature has expressed the public policy of this state on the subject of discrimination against any of its citizens because of race, color, or creed. By such

act the legislature has declared that such discrimination "menaces and undermines the institutions and foundations of a democratic state" and tends to condemn large groups to living conditions which are "inimical to the general welfare and contrary to our democratic way of life."

6. It cannot truly be said that the policy of our state on the subject of civil rights has ever been different than as stated in c. 953. That chapter expresses principles of basic human justice broadly stated in the Declaration of Independence and delineated from time to time by various amendments to the Constitution of the United States.

7. Under the pleadings in this case the defense that a deed to a cemetery lot was given through mistake or misrepresentation as to the race or nationality of the grantee is not a mistake or misrepresentation as to a material fact which would entitle the grantor to equitable rescission.

OPINION

MURPHY, Justice.

The plaintiffs, Ramona W. Erickson and David E. Erickson, prevailed in a declaratory judgment action in which the court below held that a restrictive covenant in a deed issued to the plaintiffs by the defendant, Sunset Memorial Park Association, Inc., which denied burial to one who was not a Caucasian was void under the statutes and public policy of the State of Minnesota. The defendant cemetery appeals.

The plaintiff, Ramona W. Erickson, is a full-blooded American Indian. Her husband, David E. Erickson, is a Caucasian. On August 26, 1955, the plaintiffs purchased a burial lot from the defendant. The printed application to purchase, which was signed by the Ericksens, contained the clause:

"The undersigned Purchaser(s), who represent(s) himself (herself) (themselves) to be a member or members of the Caucasian race, hereby make(s) application to purchase certain burial space * * *."

The deed issued to the plaintiffs contains the following condition:

"The party of the second part [the Ericksens] covenants and agrees that said property hereby conveyed shall be used only for the interment or burial of deceased persons of the Caucasian race * * *."

On April 18, 1958, after Mrs. Erickson had informed the cemetery authorities that she was of Indian descent, they advised her by letter that they could not permit her to be interred on the property. They advised her that from the \$360 paid for the lot certain expenses had been incurred, including a 20-percent assessment for perpetual care of the property, and that the maximum they could offer her, if she wished to sell, would be \$198.

The answer of the defendant corporation alleged that its rules and regulations governing use of its cemetery limited interment in the cemetery to members of the Caucasian race, and that if the officer who had executed the acceptance of the plaintiffs' purchase application had known that Mrs. Erickson was an Indian, defendant would not have issued the deed. The answer does not allege fraud or deceit in the procurement of the deed. At most it alleges mistake and misrepresentation as to the race of one of the grantees. It asserts the restrictive covenant as a defense to the plaintiffs' action and asks that the relief demanded by the complaint be denied and that it have its costs and disbursements.

The trial court granted judgment on the pleadings, being of the view that the restrictive covenant was void under the laws of Minnesota and the public policy of this state. In support of his conclusion, he quoted from the concurring opinion of Mr. Justice Dooling in *Long v. Mountain View Cemetery Assn.*, 130 Cal.App.2d 328, 330, 278 P.2d 945, 946, as follows:

"* * * I cannot believe that a man's mortal remains will disintegrate any less peaceably because of the close proximity of the body of a member of another race, and in that inevitable disintegration I am sure that the pigmentation of the skin cannot long endure. It strikes me that the carrying of racial discrimination into the burial grounds is a particularly stupid form of human arrogance and intolerance. If life does not do so, the universal fellowship of death should teach humility. The good people who insist on the racial segregation of what is mortal in man may be shocked to learn when their own lives end that God has reserved no racially exclusive position for them in the hereafter."

A number of important questions are raised on this appeal. They are presented by lengthy

briefs which contain a great deal of able argument but little by way of helpful precedent.

1. The first point which has been stressed by the briefs and arguments of the parties, and which we now consider, relates to the application of U.S. Const. Amend. XIV as it bears upon the denial of the right of the plaintiffs to own and use the property because of the restrictive covenant in the deed. The plaintiffs argue that, if the court sustains the defense based upon a covenant discriminating against race, it is acting as an agency of the state to enforce that which Amend. XIV prohibits. The cemetery, on the other hand, argues that private agreements between citizens are not within the scope of Amend. XIV and that state action which does no more than permit a landowner to discriminate on the basis of race in selling land is constitutional state action. Amend. XIV, § 1, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws" nor "deprive any person of life, liberty, or property without due process of law" nor "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

In support of their respective positions the parties labor the dialectics of three important cases which deal with the vague line of demarcation between what is constitutional and what is unconstitutional state action within the scope of Amend. XIV. These cases are *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441; *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586; and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 245 Iowa 147, 60 N.W.2d 110. In view of the disposition we make of the case before us, a searching analysis of these authorities is not warranted. It is enough for our purposes to briefly summarize them.

Prior to *Shelley v. Kraemer*, supra, it was held in the Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, that the provisions of Amend. XIV refer only to "state" as distinguished from "private" action. It was said in those cases that the amendment was intended to correct wrongs resulting from (109 U.S. 13, 3 S.Ct. 23, 27 L.Ed. 840) "State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment." It is clear that state statutes or ordinances which compel racial discrimination are unconstitutional and within the scope of the

amendment. It also appears that the amendment applies to action by the legislative, the executive, the judicial authorities, or the agents of such authorities exercising a governmental function, to aid in the enforcement of restrictive or discriminating acts or agreements. But when, if at all, a judicial determination of the rights of private parties to a contract containing discriminatory provisions as to race, color, or creed takes on the character of unconstitutional state action is not entirely clear. The three cases already referred to deal with this question.

Shelley v. Kraemer, supra, involved two actions, each instituted to enforce an agreement among property owners imposing a restriction against occupancy of lots within a particular area by any person not of the Caucasian race. In those cases Negroes had acquired title to lots in the restricted areas and had gone into occupancy. In both cases the owners of the other property subject to the terms of the restrictive covenant sought injunctive relief restraining the Negroes from taking possession of the property or requiring them to move, and in one case the other property owners also sought a decree divesting the Negroes of title. The Supreme Court of the United States held that in granting judicial enforcement of the restrictive agreements in these cases the state had denied equal protection of the law. That decision recognized that a person is privileged to deal with whom he chooses and refusal to deal with one because of his race, color, or creed is private conduct not within the scope of the amendment. The court explained (334 U.S. 13, 68 S.Ct. 842, 92 L.Ed. 1180, 3 A.L.R.2d 460):

"* * * So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

That decision made it clear, however, that by granting judicial enforcement of the restrictive agreements discriminating against Negroes, the state courts had denied the parties equal protection of the laws. The effect of the decisions of the lower courts was to compel others not to deal with the interested parties because of their race. It was pointed out that the state courts, by granting the injunctions, had made available (334 U.S. 19, 68 S.Ct. 845, 92 L.Ed. 1183, 3 A.L.R.2d 463):

" * * * the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."

The later case of *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, involved an action for damages for breach of a covenant entered into between the owners of residential property restricting the use and occupancy thereof to persons of white or Caucasian race and obliging the signers to incorporate this restriction in all subsequent transfers. The United States Supreme Court held that the restrictive covenant could not be enforced at law by a suit for damages against a co-covenantor who broke the covenant. A Negro had purchased and gone into occupancy of premises pursuant to a conveyance by a former owner who had not incorporated the restrictive covenant into the deed. It was there held that, when parties cease to rely upon voluntary action to carry out the covenant and the state is asked to step in and give its sanction to the enforcement of the covenant, unconstitutional state action would necessarily follow. The court held that, by punishing and awarding damages for the breach, the state court would in effect encourage the use of restrictive covenants and that (346 U.S. 254, 73 S.Ct. 1033, 97 L.Ed. 1594) "[t]o that extent, the State would act to put its sanction behind the covenants."¹

The defendant relies on *Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W.2d 110, 118. There the plaintiff brought suit for damages for breach of contract against the defendant private cemetery for refusing to bury her non-Caucasian husband. As in the case before us, the defense was that the contract provided that the cemetery would accept only "members of the Caucasian race" for burial. The Iowa Supreme Court held that there was no unconstitutional state action in giving the contract provision effect as a defense. It pointed

out that "state action," within the purview of U.S. Const. Amends. V and XIV and the provisions of its state constitution, was limited (245 Iowa 157, 60 N.W.2d 116) "to direct action by the legislative, the executive, the judicial authorities or any person or group exercising a governmental function, to aid in the enforcement of restrictive or discriminating acts or agreements." At the risk of oversimplifying the holding in this able and closely reasoned decision, it may be said that the Iowa court took the position that in the case before it the element of "exertion of governmental power" directly in aid of discrimination or other deprivation of right was not present, and that in denying the plaintiff's claim it was maintaining a position of "neutrality." In further explanation of its position that the decision denying plaintiff's claim was not state action, the court said (245 Iowa 159, 60 N.W.2d 117):

"It is fundamental in our law that a private individual may, unless expressly forbidden by police power enactments, deal freely with whom he pleases, and his reasons or policy are not the concern of the state. The state may not aid him in certain of his restrictive or arbitrary agreements, and so here if plaintiff had herself lowered her deceased husband's body into the ground in violation of her agreement with defendants, the State would have had to deny defendants aid in restraining her, nor could it have helped in punishing her for violating that agreement."

The Supreme Court of the United States granted certiorari and the case was affirmed per curiam by an equally divided court. 348 U.S. 880, 75 S.Ct. 122, 99 L.Ed. 693. However, on rehearing the court vacated its affirmance because an Iowa statute enacted after commencement of the suit bars the question presented by it from again arising in that state. 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897.²

It appears from the decisions discussed that a plaintiff may not enforce by judicial action discriminatory racial covenants. Such relief would involve coercive or affirmative action by

1. See, also, *Clifton v. Puente*, Tex.Civ.App., 218 S.W.2d 272.

2. In his dissent from the latter order, Mr. Justice Black said (349 U.S. 80, 75 S.Ct. 620, 99 L.Ed. 904): " * * * We granted certiorari because serious questions were raised concerning a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. Those questions remain undecided."

a court which would be in the nature of unconstitutional state action. It also appears that a defendant in an action may invoke such a covenant as a defense. It is not necessary for us to reconcile or evaluate these decisions since the issue before us may be determined by application of principles of law contained in our constitution, statutes, and declarations of public policy.

2. We may rest our decision in this case upon Minn.St. 507.18, which makes unlawful covenants in a writing relating to real estate which discriminate against any class of persons because of their religious faith, race, or color. That section provides:

"Subdivision 1. No written instrument hereafter made, relating to or affecting real estate, shall contain any provision against conveying, mortgaging, encumbering, or leasing any real estate to any person of a specified religious faith, creed, race or color, nor shall any such written instrument contain any provision of any kind of character discriminating against any class of persons because of their religious faith, creed, race or color. In every such provision any form of expression or description which is commonly understood as designating or describing a religious faith, creed, race or color shall have the same effect as if its ordinary name were used therein.

"Subd. 2. Every provision referred to in subdivision 1 shall be void, but the instrument shall have full force in all other respects and shall be construed as if no such provision were contained therein.

"Subd. 3. As used in this section the phrase 'written instruments relating to or affecting real estate,' embraces every writing relating to or affecting any right, title, or interest in real estate, and includes, among other things, plats and wills; and the word 'provision' embraces all clauses, stipulations, restrictions, covenants, and conditions of the kind or character referred to in subdivision 1.

"Subd. 4. Every person who violates subdivision 1, or aids or incites another to do so, shall be liable in a civil action to the person aggrieved in damages not exceeding \$500."

A deed conveying an interest in a cemetery lot is an instrument "relating to or affecting real

estate" within the purview of this particular statute. Concededly, the deed here contains a provision discriminating against a class of persons, specifically non-Caucasians, because of race and color; and, if § 507.18 is applicable, it must also be conceded that the racially restrictive covenant in the deed is not only prohibited but rendered void.

But the defendant urges that § 507.18 does not apply, because it affects only instruments relating to ownership and use of land by and for living persons and does not relate to instruments conveying burial rights in cemetery land. In support of this argument the defendant refers to § 327.09, the so-called "accommodation statute," which has application to discrimination in "theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshments, * * *." It is contended that the so-called "accommodation statute" applies only to living persons and that § 507.18 is in the same category and therefore is designed as a form of civil-rights statute concerned only with property rights of living persons in land. We agree with the trial court that this contention of the defendant is entirely without merit. In his memorandum the trial court said:

"* * * the short answer is that both Mr. and Mrs. Erickson are living persons, and the contention of defendant, if sustained, would discriminate against them and affects their ownership or use of an interest in real estate."

Moreover, § 327.09, the "accommodation statute," deals with persons denied accommodations for some reason, whereas the statute before us deals broadly with the subject of written instruments relating to real estate and strikes down those restrictive provisions in such instruments which discriminate "against any class of persons because of their religious faith, creed, race or color."

3. It is next contended by defendant that § 507.18 applies only to instruments affecting ordinary property rights in land and not to a deed granting the special property right of sepulture in cemetery land. Whether the purchaser of burial space acquires a special kind of estate in fee subject to various conditions, regulations, and restrictions coupled with the use of common cemetery facilities or a kind of perpetual ease-

ment coupled with an interest in the entire cemetery, or whether the property is a special kind of perpetual license or privilege, the fact remains that it is, nevertheless, an "interest in real estate" within the purview of the statute. Our statutes treat ownership of an interest in a cemetery lot as an interest in real estate. They provide for transfer of the interest by sale or inheritance (§§ 306.09, 306.15, 306.29, 525.14) and provide that actions by a public cemetery association to quiet title to cemetery lots may proceed in the same manner as actions to determine title to real estate (§ 306.22). Even though a purchaser of a cemetery lot may not acquire the fee simple title to the property, he has a right in the lot which the law recognizes and protects.³

4. It is next contended by the defendant that § 507.18 is not applicable to a deed granting the right of sepulture, for to so apply it would necessarily result in a holding that the right to own and use lots in a cemetery maintained by a particular religious faith could not be restricted to members of that faith.

We cannot agree with this contention. It should be recognized that the defendant, Sunset Memorial Park Association, Inc., is a public cemetery as defined by § 306.87, subd. 3, which provides:

"All cemeteries heretofore started or established as public cemeteries and all cemeteries hereafter started or established, *except cemeteries established by religious corporations*, are hereby declared to be public cemeteries within the provisions of this chapter." (Italics supplied.)

Moreover, the defendant corporation operates a public burying ground which is exempt from taxation under Minn.Const. art. 9, § 1. The public nature and character of its business and interests, as reflected by the provisions of c. 306, by virtue of which the state permits it to operate, should be distinguished from the private character of cemeteries operated by religious and fraternal corporations under c. 307 and cemeteries within the purview of the last sentence of § 306.02, which recognizes the right of a public cemetery association affiliated with a

religious corporation to acquire properties to be used exclusively for burial of persons of that particular faith.⁴ From time immemorial cemeteries and interment in them have had a close identification with religion. This identification is natural to religion in civilized cultures. An essential element of many religious beliefs, strongly held for centuries, has been that their communicants must be buried in consecrated ground in which only communicants of that particular faith may be buried. The right of burial in a religious or fraternal cemetery derives from membership. It is for that reason that church cemeteries are classified as private cemeteries in which the exclusive burial of communicants of a religious faith may be practiced in accordance with its beliefs.

We see no conflict between §§ 507.18 and 306.02, as the defendant suggests. A statute is to be construed, where reasonably possible, so as to avoid irreconcilable difference and conflict with another statute. The general terms of a statute are subject to implied exceptions founded on rules of public policy and the maxims of natural justice so as to avoid absurd and unjust consequences. We are not to assume that the legislature, by enacting § 507.18, which confirms the civil right of equal protection under the law, intended to infringe upon civil rights relating to freedom of religion as provided by U.S.Const. Amend. I and Minn.Const. art. 1, § 16. It seems to us that § 507.18 by necessary implication excepts private religious and fraternal cemeteries from its application. This implication is so strong in its probability that the contrary thereof cannot be reasonably supposed. Moreover, the legislature acted with full knowledge of the scope of its constitutional powers and of prior legislation on the same subject. We are not to assume that the legislature intended to overthrow long-established civil rights by including within the provisions of § 507.18 a purpose or object hostile to religious practice. *Pomeroy v. National City Co.*, 209 Minn. 155, 296 N.W. 513, 133 A.L.R. 766.

5. It is of great importance to note that Minnesota by legislative action has clearly set its policy against all forms of religious or racial

3. On the nature of the estate acquired by the purchaser of a cemetery lot, see *State v. Lorentz*, 221 Minn. 366, 22 N.W.2d 313, 163 A.L.R. 1036; *Daniell v. Hopkins*, 257 N.Y. 112, 177 N.E. 390, 76 A.L.R. 1367; *Sockel v. Degel Yehudo Cemetery Corp.*, 268 App.Div. 207, 49 N.Y.S.2d 176.

4. Minn.St. 306.02 reads in part as follows: "Any such cemetery association so affiliated with a religious corporation * * * may also provide for the acquisition of other cemetery properties within the state wherein bodies of persons of the same religious faith, exclusively, are to be buried."

discrimination. In addition to § 507.18 and § 327.09, the so-called "accommodation statute," our legislature in 1957 enacted L.1957, c. 953. That act contains a legislative finding and a declaration of public policy against discriminatory practices. That act provides in part:

"Section 1. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, color, creed, religion, national origin or ancestry are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces and undermines the institutions and foundations of a democratic state. The legislature hereby finds and declares that discrimination or segregation in the sale, lease, sublease, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations because of race, color, creed, religion, national origin or ancestry tends unjustly to condemn large groups of inhabitants to depressed and substandard living conditions which are inimical to the general welfare and contrary to our democratic way of life. The aforementioned practices of discrimination and segregation in the sale, lease, sublease, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations because of race, color, creed, religion, national origin or ancestry are declared to be against the public policy of this state.

"Sec. 2. The opportunity to buy, acquire, lease, sublease, occupy and use and enjoy property and to obtain decent living and housing accommodations without discrimination because of race, color, creed, religion, national origin or ancestry is hereby recognized and declared to be a civil right.

"Sec. 3. A commission to investigate and study discrimination and segregation because of race, color, creed, religion, national origin or ancestry in the sale, lease, sublease, transfer, use occupancy, tenure, acquisition or enjoyment of property or housing accommodations as well as investigating the possibility of strengthening the states civil rights program by encouraging the work of the governor's human rights commission and the fair employment practice commission with possible recommendations as to their organization, is hereby created to consist

of five members of the senate, to be appointed by the committee on committees, and five members of the house of representatives to be appointed by the speaker. The appointment of such commission shall be made upon passage of this act.

"Sec. 4. The commission may hold meetings at such times and places as it may designate. It shall select a chairman, and such other officers from its membership as it may deem necessary.

"Sec. 5. The commission may subpoena witnesses and records and employ such assistants as it deems necessary to perform its duties effectively. It may do all the things necessary and convenient to enable it to perform its duties.

"Sec. 6. The revisor of statutes and every other state agency shall cooperate with the commission in all respects so that its purpose may be accomplished. The commission shall use the available facilities and personnel of the Legislative Research Committee unless the commission by resolution determines a special need or reason exists for the use of other facilities or personnel.

"Sec. 7. The commission shall report to the legislature on or before January 15, 1959, setting forth its recommendations."

It was on the basis of the foregoing declaration of public policy, and on his interpretation of § 507.18, that the lower court concluded that the racial restrictive covenant in this case was against Minnesota's public policy.

6. It is our view that defendant's argument that public policy declared by L. 1957, c. 953, cannot be given retroactive effect is without merit. The defendant relies on § 645.21, which provides:

"No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."

Although the policy of respect for the civil rights of all citizens, as expressed by c. 953, may not have always been honored by universal observance, it cannot be truly said that the policy of our state has ever been otherwise. That chapter expresses principles of basic human justice which are broadly stated in the Declaration of Independence and which from time to time have been delineated by various amend-

ments to the Constitution.⁵ Moreover, Minn. Const. art. 1, § 2, provides in part:

"No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

In *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 224, 14 N.W.2d 400, 405, in discussing rights and privileges secured to citizens under Minn. Const. art. 1, § 2, we said:

"The entire social and political structure of America rests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family relations—all under equal and impartial laws which govern the whole community and each member thereof. * * * The rights, privileges, and immunities of citizens exist notwithstanding there is no specific enumeration thereof in State Constitutions."

7. The final point raised by the defendant is not clearly defined. It appears to be its contention that it has an equitable right to rescind and cancel the deed because of "mutual mistake or fraudulent misrepresentation as to a fact material to the transaction." It should be

5. Amend. I—Freedom of religion, speech, and press; Amend. II—Right to bear arms; Amend. III—Quartering of soldiers; Amend. IV—Security against search; Amend. V—Due process of law; Amend. VI—Right to speedy trial; Amend. VII—Right to trial by jury; Amend. VIII—No cruel punishment; Amend. XIII—Abolishing slavery; Amend. XIV—Equal protection of the laws; Amend. XV—Negro suffrage; Amend. XIX—Woman suffrage.

noted, however, that the defendant by its answer does not allege fraud or deceit on the part of the plaintiffs in procuring the deed nor ask for relief by way of equitable rescission. The most that can be said for the asserted defense is that it alleges a mutual mistake or misrepresentation of fact as to the race or nationality of Ramona Erickson. It is clearly provided by § 507.18 that restrictive covenants discriminating against race are void, "but the instrument shall have full force in all other respects and shall be construed as if no such provision were contained therein." We agree with the trial court that the pleadings before him did not assert that a mistake or misrepresentation occurred as to a material fact. In this connection it should be noted that we do not have before us the claim that the defendant was deprived of the right to sell to whom it chose by the fraud or deceit of the plaintiffs. That issue was neither pleaded nor argued. It cannot be fairly said that one is entitled to relief by way of equitable rescission under circumstances where he bases his claim for relief upon a restrictive covenant which the law condemns. A decree granting such relief would take land from a purchaser for value because she is a member of a minority race. We agree with the trial court that the mistake or misrepresentation upon which the defendant relies for rescission was not a mistake of any fact which under the law was a material element of the transaction. *Thwing v. Hall & Ducey Lbr. Co.*, 40 Minn. 184, 187, 41 N.W. 815, 816; *C. H. Young Co. v. Springer*, 113 Minn. 382, 386, 129 N.W.773, 774; *Becker v. Bundy*, 177 Minn. 415, 225 N.W. 290; *Olson v. Shephard*, 165 Minn. 433, 436, 206 N.W. 711, 712.

Affirmed.

* * *

OTIS, J., not having been a member of the court at the time of the argument and submission, took no part in the consideration or decision of this case.

PUBLIC ACCOMMODATIONS Race Tracks—California

Jimmie FLORES v. LOS ANGELES TURF CLUB, INC., et al.

Supreme Court of California, In Bank, May 8, 1961, 13 Cal. Rptr. 201.

SUMMARY: A convicted bookmaker brought a civil action in the Los Angeles Superior Court against the operators of a race track for damages for assault and battery allegedly committed during his ejection from the track, and for an injunction against any future exclusion from the premises. Plaintiff having refused to leave when requested to do so, defendants had forcibly ejected him, under a California statute providing that known or convicted bookmakers might be ejected or excluded from the race tracks. Plaintiff argued that this statute is invalid because it would deprive him of a civil right of equal access to places of public amusement. The trial court's dismissal of the suit was affirmed by the California Supreme Court, which held that there is no common law or constitutional right of access to such places, but that, on the contrary, in the absence of statute there is a common law right in the proprietor to exclude anyone he chooses not to admit.

PUBLIC ACCOMMODATIONS Restaurants—Federal Statutes

Charles E. WILLIAMS v. HOT SHOPPES, Inc., etc.

United States District Court for the District of Columbia, January 27, 1960. No. 3332-59.

United States Court of Appeals for the District of Columbia Circuit, April 20, 1961, No. 15610, _____ F.2d _____.

SUMMARY: Plaintiff, a Negro, alleged that he was refused service in a Virginia restaurant solely because of his race. He filed suit in the United States District Court in the District of Columbia under Sections 1 and 2 of the 1875 Civil Rights Acts for statutory damages, and also asked \$5,000 damages under 42 U.S.C.A. §§ 1981, 1983. The district court granted a motion dismissing the complaint. On appeal, the United States Court of Appeals for the District of Columbia affirmed the dismissal of claims under Sections 1 and 2 of the 1875 Act, holding that these provisions apply only to private intrastate racial discrimination, and have repeatedly been declared unconstitutional. The counts of the complaint under §§ 1981 and 1983, however, were held to be based on an alleged refusal by the restaurant manager "under color of" a state statute to deprive plaintiff of "rights, privileges, or immunities secured by the Constitution . . .," and thus raised a question as to state action prohibited by the Fourteenth Amendment. The Virginia law under which defendant is alleged to have maintained segregation applies to "any place of public entertainment or public assemblage which is attended by both white and colored persons." Plaintiff contended this law has by custom and usage come to be applied to restaurants, and that restaurant operators have been threatened with prosecution under the statute if they serve whites and Negroes without segregation. The attorney general of the state, however, has ruled that the statute has no reference to restaurants. (5 Race Rel. L. Rep. 1282.) The Court of Appeals held that determination was first required in the state courts as to the application of the Virginia law before the argument could be made that the restaurant manager acted "under color of law." However, the court specifically withheld any comment on the legal validity of the claim, assuming the statute should be held applicable to restaurants. The case was remanded to the district court,

and further proceedings were authorized. One judge concurred in the result. Two judges dissented, contending that the complaint stated allegations sufficient to support a finding of action under color of law. See also, *Williams v. Howard Johnson's Restaurant*, 4 Race Rel. L. Rep. 713 (1960), involving the same plaintiff.

ORDER DISMISSING COMPLAINT

Upon consideration of defendant's motion to dismiss the complaint and after argument by counsel for the respective parties in open Court,

it is, by the Court, this 27th day of January, 1960,

ORDERED: That said motion be, and same hereby is, granted; and that this action be, and the same hereby is, dismissed.

Opinion in Court of Appeals

Before MILLER, *Chief Judge*, and EDGERTON, PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting en banc.

WASHINGTON, Circuit Judge.

Appellant Charles Williams, a resident of the District of Columbia, brought suit in the District Court against appellee Hot Shoppes, Inc., a Delaware corporation which operates restaurants in several states and the District of Columbia, to recover a statutory penalty of \$500 under Sections 1 and 2 of the Civil Rights Act of 1875, and damages of \$5,000 under 42 U.S.C. §§1981, 1983, for alleged deprivations of his civil rights. In essence, appellant's claim is that on November 5, 1959, appellee's manager denied him service at its restaurant in Alexandria, Virginia, solely because appellant is a Negro, and because Virginia law requires restaurants either to segregate their facilities or to exclude Negro patrons.¹ Appellant contended that this refusal to serve him was State action of the sort prohibited by the Fourteenth Amendment and the civil rights laws. The District Court held to the contrary and dismissed the complaint. This appeal followed.

I.

First of all, we think that the District Court properly dismissed the claim for the statutory penalty under Sections 1 and 2 of the Civil Rights Act of 1875.² These statutory provisions

1. A further contention, relative to alleged activities of state officials, will be discussed later in this opinion.
2. Act of March 1, 1875, ch. 114, §§ 1, 2, 18 Stat. 335, provides:

"That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable

were held unconstitutional as applied to private intrastate racial discrimination in the *Civil Rights Cases*, 109 U.S. 3 (1883). Later, in *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913), the Supreme Court held that these provisions could not be applied to penalize racial discrimination aboard interstate carriers even though the statute could, in that application, be upheld under the commerce power. The Court reasoned that since Sections 1 and 2 were penal in nature and were intended by Congress to have uniform national application, and since the provisions had been declared unconstitutional as applied to private intrastate racial discrimination, the statute should be held wholly

alike to citizens of every race and color, regardless of any previous condition of servitude.

"Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further*, That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively.

invalid rather than be applied in only a fraction of the cases it was intended to cover. In *United States v. Raines*, 362 U.S. 17, 23 (1960), the Supreme Court expressly reaffirmed the *Butts* decision. Therefore, even if appellee's conduct is assumed arguendo to be State action, Sections 1 and 2 of the Civil Rights Act of 1875 have no present validity, and appellant's claim under them was properly dismissed.³

II.

We turn now to appellant's claim for damages under 42 U.S.C. §§ 1981, 1983.⁴ Section 1983 creates a civil action against "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." In order to constitute conduct under "color of law,"⁵ within the reach of the Federal Constitution and statutes, it is essential that appellee's refusal to serve appellant be State action. See *Burton v. Wilmington Parking Authority*, — U.S. —, 29 U.S.L. WEEK 4317 (April 18, 1961); *Monroe v. Pape*, — U.S. —, 29 U.S.L. WEEK 4157 (Feb. 20, 1961). It is also clear that there must be a deprivation of a right, privilege or immunity "secured by the Constitution and laws" of the

United States. For example, in the *Monroe* case, just cited, the plaintiff's immunity from unreasonable search and seizure, guaranteed by the Fourth Amendment to the Constitution, had been grossly violated by the defendants.

In the instant case, the pertinent portions of the complaint are as follows:

"4. November 5, 1959, plaintiff entered defendant's restaurant at 900 North Washington Street, Alexandria, Virginia, in a peaceful and orderly manner, for the purpose of obtaining food and beverage, while it was then open for business and occupied by others of the public who were then enjoying the accommodations of the business conducted on the premises. But defendant's manager, one Fred McClure, acting within the scope of his authority, refused to serve plaintiff and excluded him from the restaurant, solely by reason of plaintiff's race or color, under the color of state law, custom or usage.

"5. Defendant's manager stated that Virginia law required him to refuse to serve plaintiff and to exclude plaintiff from the dining room; that neither he nor defendant had any personal or other reason for excluding plaintiff from the restaurant except for the understanding that Virginia law, as well as the custom and usage of the community, compelled the exclusion of colored persons from the restaurant.

"6. Sec. 18-327, CODE OF VIRGINIA, requires operators of 'any place of public entertainment or public assemblage which is attended by both white and colored persons,' to segregate them, under penalty of fine of not less than \$100 or more than \$500 for each violation of the statute. Sec. 18-328, CODE OF VIRGINIA, requires patrons to comply with such segregated seating, under penalty of fine of not less than \$10 or more than \$25 for each violation of the statute; authorizes the operator or manager of the place, 'or any public (sic) [police] officer or other conservator of the peace,' to eject any person who fails to comply with such segregation requirement; and provides that any such ejected person shall not be entitled to a refund of any admission paid by him. These laws, in effect, require operators of places of public accommodation, including the aforesaid restaurant, which are open to the general public, to exclude all

3. A like decision was reached by the Fourth Circuit in another suit brought by appellant, at an earlier date. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (1959).

4. Sections 1981 and 1983 provide:

"1981. Equal rights under the law.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 16 Stat. 144, as amended.

§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 17 Stat. 13, as amended.

5. This expression is generally used to sum up the words "under color of any statute, ordinance, regulation, custom, or usage." As to "custom or usage," see *Williams v. Howard Johnson's Restaurant*, supra note 3, at 848.

Negroes unless special facilities are provided to segregate them from the rest of the public.

"7. The cited Virginia laws impose an economic burden upon defendant by requiring it to erect partitions of separate facilities for white and colored persons in restaurants operated in Virginia, and thus tend to compel defendant, in order to avoid that burden, to exclude all colored persons entirely. It is a violation of the Fourteenth Amendment to the federal Constitution for the State of Virginia to require the exclusion or segregation of persons in places of public accommodation, solely because of their race or color, irrespective of whether such state compulsion is exercised or accomplished directly or indirectly.

"8. The defendant, as well as other public restaurant keepers in Virginia are following, and have for many years followed, a custom or usage of systematically excluding Negroes from their facilities under the color of sec. 18-327, CODE OF VIRGINIA. *This custom or usage of Virginia has been produced by the interplay of governmental and private action over a long period of time.* By being excluded from public dining facilities by reason of said custom or usage, Negroes, including the plaintiff, are deprived of 'the full and equal benefit of all laws,' respecting access to public restaurants, 'as is enjoyed by white citizens,' under the color of state law, custom or usage, in violation of 42 U.S.C., sec. 1981, and sec. 1, Act of 1875." (Emphasis supplied.)

The complaint is thus grounded upon the theory that the Virginia public assembly statute, Section 18-327 of the Virginia Code,⁶ applies to restaurants, and compels segregation therein. This was the theory on which Williams pleaded and argued his case in the District Court, and on which he at first based his appeal to this court. Later, in this court, he advanced a further theory—that appellee's refusal to serve him was caused solely by the understanding generated by the conduct of State law enforcement officials. Appellant now tells us that the police and prosecutors of Virginia have threatened action against restaurants which do not segregate, and that

this was state action, whether or not based on any statutory foundation. The complaint does not say this. But appellant argues that it can be read to say it, relying on the italicized portion of paragraph 8, quoted above. It is there alleged that defendant and other restaurant owners have followed "a custom or usage of systematically excluding Negroes from their facilities under color of sec. 18-327, CODE OF VIRGINIA. This custom or usage of Virginia has been produced by the interplay of governmental and private action over a long period of time." The only "custom or usage" alleged is that which arises under color of the statute. Legislative action alone is complained of: nothing is said about executive or police action. The reference to "interplay of governmental and private action" seems clearly to mean that as a result of the governmental action, i.e., the statute, private persons and firms such as defendant have been compelled to discriminate against plaintiff.⁷

The background of this litigation, a matter of public record, may also be noted. Appellant Williams had brought an earlier suit against another restaurant in Virginia, for refusal of service, basing his complaint on the theory of an interference with interstate commerce. When the case came before the Fourth Circuit, appellant conceded that Section 18-327 of the Virginia Code did not apply to restaurants. See *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 at 847 (1959). The Fourth Circuit unanimously affirmed the dismissal of the complaint, saying that "Unless these actions [of refusing service to Negroes] are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint." *Ibid.* The Fourth Circuit's opinion came down on July 16, 1959. The incident at the Hot Shoppe restaurant, on which the present suit is based, occurred on November 5, 1959. The complaint herein, filed on November 25, 1959, was apparently framed to fit the quoted language of the Fourth Circuit, relying on Section 18-327

6. Recently re-enacted as Section 18.1-356 of the Code. See VA. CODE ANN., Supp. 1960, at § 18.1-356.

7. The words "interplay of governmental and private action" are evidently derived from the opinion in *NAACP v. Alabama*, 357 U.S. 449 at 463 (1958). The Court was there speaking of the state's action in seeking to compel—by statute—disclosure of the names of members of the NAACP, which would allegedly be followed by private action in the shape of economic reprisals and "other manifestations of public hostility." P. 462 of 357 U.S. Legislative action was the "governmental action" referred to in the *NAACP* case; the same is true in this case.

as the "positive provision of state law" which would provide the basis of the new action.⁸

The rule in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), on which appellant relies, is of no help to him. That rule, that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief," cannot be used to justify the filing of unsworn statements in an appellate brief which would in effect substitute a new complaint for the old. The essence of modern pleading is that there be adequate notice to the defendant of plaintiff's claims. Here there is no allegation in the complaint as to threatening activities on the part of Virginia police and prosecutors, and, equally important, no allegation whatever that the defendant actually knew of any such activities, or that the refusal to serve plaintiff was based on fear of such activities or was in any influenced by them, if in fact they existed.⁹

The complaint, in our view, alleges no more than this: that the restaurant manager discriminated against plaintiff because he believed he was compelled to do so by the Virginia statute. Accordingly, we need not decide whether a cause of action would be stated if the restaurant manager had been compelled to discriminate by administrative officers of the state in the absence of an applicable statute, since that is not alleged.

8. This recital is not intended to cast any reflection on appellant, whose desire to obtain equality of treatment for members of his race is entitled to respect, but to illuminate the theory on which the present complaint was brought.

9. All that appellant has told us in writing on the subject appears at page 9 of his supplemental memorandum in this court, where he says:

"Va. Code sec. 18-327 has been widely regarded as compelling racial segregation in places of public accommodation of all sorts, including restaurants. Such belief was supported by the decisions of the United States District Court for the Eastern District of Virginia (per Judge Albert V. Bryan who has had long experience with Virginia law) that this provision applies to restaurants. See *Nash v. Air Terminal Services*, 85 F.Supp. 545, 548 (1949); *Air Terminal Services v. Rentzel*, 81 F. Supp. 611 (1949). This widespread belief was also fostered by the repeated public expressions over the years by many prosecuting officials of Virginia that racial segregation in eating places was required by Virginia law.¹ [E.g., WASHINGTON POST, June 24, 1960, p. A-1.]"

Later, appellant filed with us a number of newspaper clippings in support of the statement last made. Assuming the clippings to be correct reports of various episodes, there is no allegation that they came to appellee's attention, or influenced its action.

III.

Decision whether the complaint, so read, states a claim for damages under 42 U.S.C. §§ 1981 and 1983 would depend upon the answers to these questions: (1) Does the Virginia public statute apply to restaurants, and require their owners to segregate by race? (2) If it does not so apply, has appellee nevertheless deprived appellant of a federally-protected right, under "color of law"? (3) If it does apply to restaurants, is the statute unconstitutional? (4) If it is unconstitutional, but appellee relied on it in good faith, has appellee subjected itself to damages for depriving appellant of a federally-protected right, under color of law? (5) Has there in any event been "state action" as distinguished from private action? The answers to all these questions, in greater or lesser degree, must depend upon the interpretation to be given to the Virginia public assembly statute, Section 18-327 of the Code. No Virginia court, as far as we are aware, has ever published an opinion on the matter. The Attorney General of the State, in a well-reasoned opinion, has said that in his view the statute has no application to restaurants.¹⁰ If he is right, the appellant's cause of action, as stated in the complaint, disappears. The temptation is great to indicate our agreement with his view, and let the case be disposed of on that basis, i.e., an affirmance without more.

The Supreme Court has many times indicated, however, that in situations like the present, where the solution of novel and serious constitutional questions depends on the interpretation to be given a state statute, not yet construed by the state courts, the Federal courts should abstain from interpreting the state statute.

Appellant urges that the doctrine of abstention is not applicable here. He contends that the interpretation to be given Section 18-327 is not potentially dispositive of the case, and maintains (1) that an action will lie, under 42 U.S.C. § 1983, upon proof of deprivation of rights "under color of . . . custom, or usage", without reference to state law; and (2) that "state action" includes the acts of a private person performed under supposed compulsion of state law, even though such acts are not so compelled, provided only that the mistake of law be reasonable.

Both these contentions must be rejected. As to the argument based upon the "custom or

10. See Appendix.

usage" language of the statute, we join with the unanimous decision of the Fourth Circuit in support of the proposition that—

"The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment." *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845, 848 (4th Cir. 1959).

A reading of the statute as broad as that urged by appellant here would raise grave constitutional questions, and in fact would be contrary in substance to the holding in the *Civil Rights Cases*, 109 U.S. 3 (1883).

Similarly, the argument based upon reasonable mistake of law reaches too far beyond the established lines of constitutional authority to be sustained. Under existing decisions, "color of law" requires a vesting of actual authority of some kind. In the *Screws* case, *supra*, it was established that the unlawful acts of an individual might be imputed to the state (for purposes of applying the Fourteenth Amendment) if the state had done acts clothing the wrongdoer with the trappings of its sovereignty. A similar view is implicit in the latest pronouncement of the Supreme Court on the subject, *Monroe v. Pape*, *supra*. But where the state has done nothing of that sort, we fail to see how the acts of a wrongdoer, no matter how reasonable his mistake of law, may be imputed to the state.

We conclude therefore that relief would be barred, and the suit concluded, by a determination in the Virginia courts that Section 18-327 does not apply here. This being so, we believe that we are obliged on the present facts to withhold Federal sanctions and permit the state courts to rule upon the question of state law.

We consider such abstention not merely within the discretion of this court, but compelled by the reasoning implicit in a series of recent decisions of the Supreme Court. We are mindful that "no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959).

It is, at the very least, unseemly for a Federal court to "guess at the resolution of uncertain and difficult issues of state law." *Alleghany County v. Mashuda Co.*, 360 U.S. 185, 187

(1959). And the Supreme Court has said that where the issue "involved the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality," *Leither Minerals, Inc. v. United States*, 352 U.S. 220, 229, we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." *Louisiana Power and Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959).

There can be no dispute about the presence of a grave and novel Federal constitutional question in the case at bar. Much more than the constitutionality of the Virginia statute is at stake. The issue appellant seeks to have us decide is whether there is a federally-protected right to be free of state-compelled segregation in a privately-owned and operated restaurant, or to put it more narrowly, whether the Fourteenth Amendment has empowered the Congress to provide a civil remedy against private restaurant operators who discriminate by reason of race under compulsion of state law, and whether Congress did provide such a remedy when it passed the statute appellant here invokes, Section 1983 of Title 42. The scrupulous care with which the Supreme Court has recently treated similar questions, see *Boynton v. Virginia*, 364 U.S. 454 (1960), is a clear warning against the dangers of premature decision. It would be most rash for us to act gratuitously where the claimed rights and privileges of one group of citizens are arrayed against the claimed rights and privileges of other groups. Grave problems of Federal-state relationships are also presented.

While the roots of the abstention principle may lie in the Federal equity jurisdiction, see *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the Supreme Court has clearly indicated in two recent cases that the application of the abstention doctrine does not depend on whether a complaint has demanded equitable or legal relief. See *Louisiana Power and Light Co. v. City of Thibodaux*, *supra*; *Clay v. Sun Insurance Office*, 363 U.S. 207 (1960). That relief at law is demanded here is thus no bar to abstention.

Nor do we deem it material that the potential area of conflict in the instant case lies between the Federal courts and the state acting through its legislature, rather than through its administrative agencies. Certainly where Federal courts run the risk of becoming enmeshed in the func-

tions of state administrative bodies vested with the responsibility for developing and applying a continuing state policy, special reasons for abstaining are present. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. 341 (1951). That is not to say, however, that conflict with a state administrative agency is a *sine qua non* for the application of the doctrine; and it is clear from the Supreme Court's decision in *Harrison v. NAACP*, 360 U.S. 167 (1959) that such is not the case. Like *Harrison*, the case at bar involves potential Federal interference with a state policy of segregation as expressed through its statutes.¹¹ It has been argued that such a policy is not entitled to deference. Mr. Justice Douglas, dissenting in *Harrison*, points out that jurisdiction there was largely premised on the Civil Rights statutes (among them 42 U.S.C. § 1983, the one principally at issue here), and urges that by directing abstention the Supreme Court had failed "to perform the duty expressly enjoined by Congress on the federal judiciary." 360 U.S. at 184. The significance of this contention lies in the fact that it was obviously considered and rejected by a majority of the Supreme Court.

For these reasons, and guided by the decision of the Supreme Court in *Harrison*, *supra*, we abstain from decision on the merits in this case, pending resolution of the meaning and application of Section 18-327 of the Virginia Code by the courts of that state.

IV.

We do not reach, and hence do not express any view concerning, the questions of law dis-

11. In *Harrison* a set of five recently enacted Virginia statutes designed to limit the legal representation and lobbying activities of the NAACP in Virginia were challenged. The Association, prior to any test of the applicability of the statutes in the Virginia courts, brought an action to have the Federal District Court declare them unconstitutional and enjoin their enforcement. The three-judge constitutional court, basing its decision on a finding that the legislation had been enacted to nullify the effect of the Supreme Court mandate in *Brown v. Board of Education*, 347 U.S. 483 (1954), held three of the statutes unconstitutional on their face, but abstained, staying proceedings pending construction by the state courts, as to the other two. On direct appeal by Virginia from the invalidation of her barratry and lobbying statutes, the Supreme Court in a six-to-three decision reversed the lower court and directed that these three acts should likewise have been subjected to "the possibility of limiting interpretation" by the Virginia courts.

cussed in the dissenting opinion, other than as may appear in the foregoing pages.¹²

The judgment of the District Court will be vacated and the cause remanded. The District Court, of course, is authorized to conduct such further proceedings or take such further action as may be deemed appropriate and not inconsistent with this opinion.

So ordered.

CONCURRING OPINION

FAHY, *Circuit Judge*:

I concur in vacating the judgment and remanding the case to the District Court. This will afford the parties opportunity to obtain a ruling of the Virginia courts on the question of the applicability to restaurants of section 18-327 of the Virginia Code. I would require the District Court, however, to retain jurisdiction so that it may itself decide the case after such opportunity has been afforded, taking into consideration the decision of the Virginia courts if obtained, or if not obtained within a reasonable time then redeciding the case itself. The Supreme Court has approved this procedure in comparable circumstances, saying,

By retaining the case the District Court, of

12. Some of the practical consequences of the theory of the dissent—that private persons may be sued for acts committed by them under the compulsion of state officials—should perhaps be noted. One of these would appear to be that the courts of the District of Columbia would be called upon to evaluate the conduct of state officials, alleged to have infringed Federal rights, if the plaintiff has succeeded in obtaining proper service here on the person or corporation alleged to have been coerced by such state officials into taking the action complained of. Many chain stores and other great business enterprises, transacting business here and in a number of states, are subject to service of process in this jurisdiction. (Venue problems might exist as to an individual defendant, but hardly as to a corporation doing business here. See 28 U.S.C. §§ 1391, 1406). Nor do the possible consequences appear to be limited to the District of Columbia. Apparently the theory of the dissent would permit suit challenging private action on the theory of official compulsion to be brought in any jurisdiction in the country where the private defendant is found, no matter how distant that jurisdiction is from the state whose officials are being attacked. The operation of our Federal system of government might be gravely affected by any such result. The spirit of the transfer statute, 28 U.S.C. § 1404(a), if not its letter, would appear to call for the avoidance of consequences of this sort wherever possible. Any court which is asked to accept the position stated by the dissent will no doubt find it necessary to give careful consideration to the practical and governmental consequences just outlined.

course, reserves power to take such steps as may be necessary for the just disposition of the litigation should anything prevent a prompt state court determination.

Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 31.

DISSENT

BAZELON, *Circuit Judge*, with whom EDGERTON, *Circuit Judge*, joins, dissenting:

I agree with the majority that we should abstain as to the claim under 28 U.S.C. § 1983 that § 18-327 CODE OF VIRGINIA required the restaurant to provide separate facilities for Negro patrons or to exclude them.¹ But I think that the complaint states another and independent claim for relief under § 1983—namely, that appellee's refusal to serve appellant was compelled by the action of State law enforcement officials in requiring separation of the races in restaurants and was therefore "state action" and conduct "under color of" law within the meaning of the Fourteenth Amendment and § 1983. The abstention technique is inapplicable upon that claim because its validity does not hinge on a question of State law and hence no decision of the Virginia courts could moot the Federal question which it presents. *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 463 (1943).²

In my view this additional claim is sufficiently stated in the following allegations of the complaint: that appellee would not have denied appellant service "except for the understanding [of appellee] that Virginia law . . . compelled the exclusion of colored persons from the restaurant," and that appellant has been "systematically excluding Negroes from [its] . . . facilities under color of § 18-327, CODE OF VIR-

GINIA," this exclusion having been "produced by the interplay of governmental and private action over a long period of time."

My brethren of the majority find these allegations insufficient. As I read their opinion, they reach this determination by attributing to appellant a specific intent to rely solely on the applicability of § 18-327, CODE OF VIRGINIA, in order to meet the statement of the United States Court of Appeals for the Fourth Circuit³ that reliance upon a "positive provision of state law" was essential to a valid claim in these cases. There is serious question whether the meaning of appellant's present allegations may be derived from inferences drawn from such extraneous matter. But even if it may, the allowable inference would be only that appellant sought to rely on "a positive provision of state law," not that he relied on nothing else to establish that the State or its officers maintained and enforced segregation in restaurants.

I read the above described allegations as charging that appellee excluded the appellant because of appellee's "understanding" that it was required by law to do so, and that this understanding was "produced by the interplay of governmental and private action over a long period of time." To restrict proof of the basis of appellee's "understanding" to a State statute ignores settled principles of modern pleading. Rule 8(f) of the Federal Rules of Civil Procedure states, "all pleadings shall be so construed as to do substantial justice." This "excludes requiring technical exactness, or the making of refined inferences against the pleader, and requires an effort fairly to understand what he attempts to set forth." *DeLoach v. Crowley's, Inc.*, 128 F.2d 378, 380 (5th Cir. 1942). In light of these principles, the allegations of the complaint are sufficient to admit evidence that appellee's "understanding" was compelled by governmental officials acting under their apparent authority.⁴ It is "the accepted rule that a com-

1. I also concur in the result reached by the majority with respect to appellant's claim under §§ 1 and 2 of the Civil Rights Act of 1875. I do this on the authority of *Butts v. Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913). Although subsequent decisions have cast considerable doubt on the reasoning of that case, see *Wormuth, The Present Status of the Civil Rights Acts of 1875*, 6 UTAH L. REV. 153 (1958), I think that the latest expression of the Supreme Court in *United States v. Raines*, 362 U.S. 17 (1960), points to a reaffirmation of *Butts* as an exception to the general rule announced in *Raines* that a statute will be held unconstitutional only as applied to the particular facts presented in an actual case or controversy.

2. It may be argued that the existence of the remaining claim renders abstention inappropriate as to the entire case. Cf. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27 (1959).

3. *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (1959).

4. Because of the importance of the interests involved in a case of this nature, we should exercise a broad degree of discretion in reading the allegations of the complaint so as to do substantial justice. Cf. *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958), where, in reversing the dismissal of a complaint for relief under § 1983, the court found that the allegations stated a valid claim under § 1985(3) as well, although no violation of that section was alleged. The court stated that its duty was to apply the appropriate civil rights statute irrespective of whether it had been correctly described in the complaint or not.

plaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibbons*, 355 U.S. 41, 45-6 (1957), emphasis supplied. To require, as I think the majority does, that the complaint further particularize the officer's conduct and appellee's awareness of such conduct is to require appellant to plead his evidence. The Federal Rules do not require a statement of "facts sufficient to constitute a cause of action." See *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

I turn now to the legal sufficiency of the claim that appellee's refusal to serve appellant is attributable to the State because it was compelled by conduct of State officials. Since the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and subsequent cases,⁵ there can no longer be any serious doubt that freedom from state imposed racial segregation is a right "secured by the Constitution and laws" of the United States.⁶ The difficult question is whether the alleged State-compelled refusal of appellee may be deemed conduct "under color of" law for the purposes of § 1983. I think an affirmative answer is required by recognized principles which have evolved in Fourteenth Amendment adjudication.

In determining the scope of the Fourteenth Amendment, and consequently § 1983, the bare rubric that it applies only to "state action" as opposed to "private conduct" is, without more, of little aid. A state can act only through human representatives,⁷ and unless the prohibitions of

the Amendment, and the legislation designed to enforce them, apply to these representatives, they are without meaning. *Ex Parte Virginia*, 100 U.S. 339, 347 (1879).

If a state statute affirmatively required restaurant owners to segregate their facilities or exclude Negro patrons, conduct of the restaurant owners caused solely by the compulsion of such a statute would be state action and would give rise to a claim for relief under § 1983. The decisions of the Supreme Court in the "white primary" cases clearly indicate that, at the very least, a state cannot avoid the prohibitions of the Fourteenth and Fifteenth Amendments by delegating to private groups or institutions the enforcement of a policy which, if enforced by the state, would be contrary to the Constitution. See *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932). Cf. *Terry v. Adams*, 345 U.S. 461 (1953); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). And where the policy is one of racial segregation constituting an unreasonable classification under the Equal Protection Clause of the Fourteenth Amendment,⁸ the initiation and enforcement of that policy by "instrumentalities" of the State gives rise to a claim for relief under the Civil Rights Act. See *Smith v. Allwright*, *supra*; *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945). If the policy of segregation is initiated by the state legislature rather than by a private organization acting as a state "instrumentality" or exercising a "state function," whose action can therefore be imputed to the state, then, a fortiori, enforcement of that policy is prohibited by the Amendment and the implemental civil rights legislation. When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer. *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958); *Flemming v. South Carolina Electric & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), *appeal dismissed* 351 U.S. 901 (1956). "The pith of the matter is simply this, that when [private

5. E.g., *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958), *affirming* 252 F.2d 122 (5th Cir. 1958) (park and recreational facilities); *Gayle v. Browder*, 352 U.S. 903 (1956), *affirming* 142 F.Supp. 707 (M.D.Ala. 1956) (intra-state bus transportation); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), *reversing* 223 F.2d 93 (5th Cir. 1955) (golf courses); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955), *affirming* 220 F.2d 386 (4th Cir. 1955) (public beach and bathhouse). Cf. *Burton v. Wilmington Parking Authority*, 29 U.S.L. Week 4317 (April 18, 1961) (restaurants).

6. In the following cases, claims under § 1983 against State imposed racial segregation have been sustained: *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958); *Flemming v. South Carolina Electric & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956); *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

7. "The test is not whether [they] . . . are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as repre-

sentatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." *Nixon v. Condon*, 286 U.S. 73, 89 (1932).

8. *Gayle v. Browder*, 352 U.S. 903 (1956), *affirming* 142 F.Supp. 707 (M.D.Ala. 1956); *Brown v. Board of Education*, 347 U.S. 483 (1954).

groups] . . . are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power." *Nixon v. Condon*, *supra* at 88. Since a uniformed officer's enforcement of a statute requiring segregated facilities would give rise to a claim for redress under § 1983, similar enforcement by a delegated representative of the State, although ostensibly a private individual, likewise would be actionable. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 29 U.S.L. WEEK 4317, 4319 (April 18, 1961).

In asserting the claim here discussed, appellant does not contend that appellee's refusal to serve him was authorized or required by a positive provision of Virginia law; but rather that its refusal was caused *solely* by the understanding generated by the conduct of State law enforcement officials that such conduct was required by law. If appellant can prove this, he is entitled to relief. For if appellee was required by State officials acting "under color of law" to segregate its facilities or to exclude Negroes, its conduct was likewise State action and "under color of law" no less than if it had been required by an unambiguous mandate of the Virginia legislature. If the State clothed its officials with the apparent authority to enforce segregation or exclusion of Negroes in public places,⁹ and if these officials, acting by virtue of their office and purportedly pursuant to State law, by their conduct led appellee to understand and believe in good faith that it was required by law to exclude Negroes, then the appellee's action in excluding the appellant is attributable to the State.¹⁰ For Fourteenth Amendment purposes it matters not that the policy of racial segregation originated in the executive rather than the legislative or judicial branch of the State government. "Whether the statute book of the State actually laid down any such rule . . . , or not,

the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause" of the Fourteenth Amendment and the Civil Rights Acts are "directed." *Civil Rights Cases*, 109 U.S. 3, 15 (1883) (referring to the Court's decision in *Ex Parte Virginia*, *supra*). It is well established that conduct of State officials may constitute State action even though it is contrary to State law and subject to correction by higher State authority. *United States v. Raines*, *supra*.

Appellee contends that it could have segregated its facilities or excluded Negroes free from Federal restraint, and that the additional pressure of State compulsion does not change its conduct into State action. Admittedly, appellee, had it so desired as a matter of corporate policy, could have chosen to engage in such conduct without offending the Federal Statute. *Civil Rights Cases*, *supra*. But, by its motion to dismiss appellee admits, for the purposes of testing the sufficiency of the complaint,¹¹ that its exclusion of appellant was caused solely by the mandate of Virginia expressed through its apparently authorized officials and not by any exercise of private volition. Whether appellee, apart from this alleged compulsion, would have excluded appellant because of his color is a question of fact which is properly to be determined at trial.

Although the alleged official conduct required segregation, appellee excluded appellant. No significance, however, can be attached to this distinction. Appellee was left only the option of either segregating or excluding Negroes. That it was "free to choose" between segregation and exclusion does not make its election of either a matter of "choice" in the sense of response to private volition rather than public command. Appellee was compelled to choose. Whichever alternative it chose, its action would have been undertaken, according to the complaint's allegations, only because of the compulsion of the State.

The nature of the relief available under § 1983 is worthy of comment. That section speaks of granting relief in "an action at law, suit in equity, or other proper proceeding for redress." (Emphasis supplied.) Whatever may be said about the initial congressional purpose in enacting this legislation, in the last twenty years the expansion

9. Cf. *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949).

10. In determining whether the State officials did in fact conduct themselves as appellant contends, it matters not whether they were motivated by the mistaken belief that § 18.1-356 applied to restaurants or by a community custom. However, evidence upon these matters would, if available, be relevant upon the issue of whether appellee actually did understand that it was required by the State officials to exclude Negroes.

11. *Callaway v. Hamilton Nat'l Bank of Washington*, 90 U.S.App.D.C. 228, 195 F.2d 556 (1952); *Bolger v. Marshall*, 90 U.S.App.D.C. 30, 193 F.2d 37 (1951).

of the state action concept¹² and of the area of rights protected by the Federal Government¹³ have made this section an increasingly flexible vehicle for enforcing the Constitution's guarantees of individual liberties against encroachment by the states and their representatives. The relief provisions of the statute are strikingly adaptable for that purpose. The present case demonstrates this. If, in fact, appellee's refusal to serve appellant was compelled against its will, principles of equity combine with the purpose of the Act to dictate relief which would also shield appellee against such compulsion, rather than penalize appellee by imposing damages for surrendering to it. This is available under the flexible relief provisions of the statute by a declaratory judgment vindicating appellant's right to be free from state-imposed racial discrimination. For such relief, an actual controversy is required. *Evers v. Dwyer*, 358 U.S. 202. (1958). A declaratory judgment would have real meaning and purpose.¹⁴ It would vindicate a civil right basic

to human dignity, equality before the law. As the Fifth Circuit has said in recent suits to declare State imposed segregation invalid, "many, if not most, civil rights actions and those to redress denial of equal privileges and immunities are to obtain a declaration . . . of a constitutional prerogative . . . which is being ignored or denied by the defendant." *Baldwin v. Morgan*, *supra* at 787 And "in a suit of this kind plaintiffs have an absolute right to have their constitutional right declared . . ." *Jackson v. Rawdon*, 235 F.2d 93, 96 (1956).

The complaint seeks not only damages but also "such other and further relief as to the Court may seem just and proper." Even if no relief other than damages were requested, the District Court is empowered to grant the relief to which appellant proves that he is entitled at trial. Rule 54(c), Fed.R.Civ.P.; *Blazer v. Black*, 196 F.2d 139 (10th Cir. 1952); *Keiser v. Walsh*, 73 App.D.C. 167, 118 F.2d 13 (1941).

Finally the majority opinion asserts that to recognize appellant's claim under § 1983 would make the courts of the District of Columbia a possible forum for similar claims arising in any State. This is hardly a valid reason for denying relief. In any event, it overlooks the requirements of personal jurisdiction and venue and our power under 28 U.S.C. § 1404(a) to transfer a case to a more convenient forum.

appellant's rights is the paramount element of redress.

12. E.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944).
13. E.g., *Screws v. United States*, 325 U.S. 91 (1945); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).
14. Speaking to the question of the requirement of a jurisdictional amount in civil liberties cases, Mr. Justice Stone stated, "[U]nconstitutional infringement of a right of personal liberty [is] not susceptible of valuation in money." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 531 (1939) (concurring opinion). Clearly, judicial vindication of

TRANSPORTATION

Buses—Louisiana

Theodore J. JEMISON, et al. v. Jack CHRISTIAN, Individually, et al.

United States District Court, Eastern District, Louisiana, Baton Rouge Division, March 31, 1961, No. 1841 Civil Action, _____ F.Supp. _____.

SUMMARY: Six Baton Rouge, Louisiana, Negroes brought suit in federal district court against city officials and the Baton Rouge Bus Company, asking for a declaratory judgment that a city ordinance requiring racial segregation on transportation facilities in the city is unconstitutional, and for an injunction against its enforcement. The court granted plaintiffs' motion for a summary judgment, holding as a matter of law that the ordinance is unconstitutional because it denies plaintiffs and other Negroes equal protection and due process under the Fourteenth Amendment and rights secured under federal civil rights statutes. Defendants were therefore permanently enjoined from enforcing the ordinance.

CHRISTENBERRY, District Judge.

This cause came on on a previous day to be heard on motion of plaintiffs for summary judgment.

• • •

ARGUMENT

Argument.

The Court finds that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

It is the judgment of the Court that the city ordinance which requires segregation on transportation facilities in the City of Baton Rouge, Louisiana, and particularly those transportation facilities operated by the defendant Baton Rouge Bus Company, is unconstitutional, and therefore invalid.

Declaratory judgment and permanent injunction shall issue.

• • •

JUDGMENT

This cause came on for hearing on plaintiffs' motion for summary judgment.

The Court having considered the pleadings, the record in this cause, oral arguments and the briefs submitted by the parties, and after being fully advised in the premises, having found that there is no genuine issue as to any material fact and that the enforced segregation of Negro passengers solely because of race and/or color, on buses operated by the Baton Rouge Bus Company in the City of Baton Rouge, Louisiana, as required by city ordinance of the City of Baton

Rouge, violates the Constitution and laws of the United States,

Now, accordingly, it is ORDERED, ADJUDGED AND DECREED that Emergency Ordinance No. 251, of the City of Baton Rouge, requiring segregation of the races on buses, is unconstitutional and void, in that it denies and deprives plaintiffs and other Negroes similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants, their successors in office, assigns, agents, servants, employees and persons acting on their behalf be, and they are, hereby permanently enjoined and restrained (1) from enforcing the aforesaid ordinance requiring plaintiffs and other Negroes similarly situated to submit to segregation in the use of the buses in the City of Baton Rouge, Louisiana, and (2) from doing any acts or taking any action which would require any public transportation facility to segregate white and Negro passengers in the operation of buses in the City of Baton Rouge, State of Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment shall become effective when it shall have become final after exhaustion of appeals.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a copy of this judgment be served upon each of said defendants.

IT IS FURTHER ORDERED that the defendants pay all costs.

TRANSPORTATION Buses—Tennessee

R. F. MITCHELL, et al., Petitioning Prosecutors v. MEMPHIS TRANSIT MANAGEMENT COMPANY.

General Session Court of Shelby County, Tennessee, Division No. 4, April 24, 1961, No. A-1.

SUMMARY: Two residents of Memphis, Tennessee, regularly paying passengers on buses operated by the transit company serving the city, petitioned the Shelby County general sessions court for a warrant for the arrest of the company's officers. It was alleged that the company was operating buses contrary to a state statute requiring racially segregated seating

on street railway cars. Although the court found there was probable cause to believe that the company had failed to designate separate parts of its buses for white and colored passengers, it found no probable cause to believe that such action of the company amounted to a crime under the invoked statute, both because the statute had been held by the Shelby County criminal court not to apply to buses which do not run on rails and because the statute is unconstitutional under the Fourteenth Amendment and therefore unenforceable. Accordingly, the court dismissed the petition, denied the warrant, and discharged the company.

LEFFLER, Judge.

MEMORANDUM OPINION

The attorney for the petitioners in the brief supplied to this Court infers in a part of it the inferiority of the colored race and cites numerous examples of qualities indicating an uncivilized nature, referring specifically to some atrocities committed by an uneducated, uncivilized, and unChristian group of people on the continent of Africa; attempting to influence the Court that the qualities of the Africans are indicative of the qualities of the many citizens of the United States whose skin happens to be different from ours. The cases cited are of the Dred Scott slavery era.

The Court is not particularly impressed by this sociological argument and would like to call the attention of the parties concerned that cannibalistic atrocities are not confined, nor have they ever been confined, to the colored race. History is replete with numerous incidents of uncivilized conduct committed by persons of the same color as the petitioners, Mr. Norfleet and myself. We need not look much further than the front page of our daily newspapers to read about a person of our color, and, in fact, a whole nation, who in the 20th century thought it proper to annihilate and exterminate an entire race of people and did, in fact, diminish substantially their number in the most heinous way, and even felt justified in taking the lives of many small children, extracting gold from the teeth of the corpse, selling their hair and otherwise desecrating the most wonderful of God's creations. The Court is not attempting to be exclusive, but could mention a few people of the White race, and of the 20th century, that history will not favorably remember, such as Mr. Eichmann, Adolf Hitler.

The Court merely mentions these instances to illustrate the fact that cannibalism and atrocities are not confined to any particular race or color of people. To characterize the American Negro citizens by the people of Africa is just as unfair

as it would be to characterize the American German people by Hitler and Eichmann. This type of characterization and group classification is not only improper and unfair, but it is completely illogical.

This particular feature of the petitioner's brief actually has little or nothing to do with the actual merits of the case at bar, but since it was dwelt on in length, and made a part of the record, the Court felt it should comment to this extent on this phase of the case.

THE CONSTITUTIONAL STATUS OF SEGREGATED SEATING ON BUSES IN TENNESSEE

The statute here in question is found in Sections 65-1704 through 65-1709 TCA, said statute providing for a system of racially segregated seating on street railway cars operating within the State of Tennessee. The statute was enacted in 1905, and the Supreme Court of Tennessee promptly upheld its constitutionality in *Morrison v. State*, 116 Tenn. 534, 95 S.W. 494 (1905). The Supreme Court of Tennessee found that the statute was a valid exercise of the police power of the State and relied significantly upon many cases, including *Plessy v. Ferguson*, 163 U.S. 541 16 S. Ct. 1138, 41 L.ED. 256.

As is well known, *Plessy v. Ferguson* was the United States Supreme Court case clearly enunciating the doctrine of separate but equal facilities. Significantly, the *Plessy* case called in question the constitutionality of a Louisiana statute passed in 1890 providing for separate railway carriages for white and colored races.

Beginning after the war, in a series of decisions, which will be referred to later, the Supreme Court of the United States steadily chopped at the practice of segregation of the races under cover of state law, but the crucial question still remaining undecided was whether or not the separate but equal doctrine of *Plessy v. Ferguson* would be overruled. Then on May 17, 1954, as is well known, the Court, in *Brown v. Board of Education of Topeka*, 347 U.S. 483,

74 S.Ct. 686, 98 L.Ed. 873 (1954), overruled *Plessy v. Ferguson* and concluded that in the field of public education the doctrine of separate but equal had no place. Mr. Justice Warren, speaking for a unanimous Court, said, "Separate educational facilities are inherently unequal." It is significant that the Court did not, in the *Brown* case, expressly overrule *Plessy v. Ferguson*, but it was generally agreed that the doctrine of separate but equal in fields other than public education was considerably weakened by the decision in the *Brown* case.

In *Browder v. Gayle*, 142 Fed. Supp. 707 (1956), a three-judge Court in Alabama, with one judge dissenting, held both state statutes of Alabama and municipal ordinances requiring the segregation of the white and colored races on city motor buses to be unconstitutional, and the Supreme Court of the United States, in 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed. 2d 114, affirmed the decision of the trial court without opinion, the Supreme Court merely relying upon *Brown v. Board of Education*, supra, *Baltimore City v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774 (1955) and *Holmes v. Atlanta*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955). The facts of the *Baltimore City v. Dawson* case were that the Court of Appeals for the Fourth Circuit in 220 Fed.2d 386 held that segregation with respect to beaches and bath houses maintained by the public authorities of the State of Maryland could no longer be justified as a means to preserve the public peace merely because the tangible facilities furnished to one race were equal to those furnished to another. This decision was affirmed by the United States Supreme Court without opinion in the decision cited above.

In *Holmes v. Atlanta*, above cited, the question was the segregation of municipal golf courses by the State of Georgia. The District Court entered a judgment, in effect holding that municipal regulations might legitimately provide for segregation in the use of golf courses. The Court of Appeals affirmed the District Court with directions to retain jurisdiction for enforcement of this decree. The Supreme Court of the United States vacated both judgments and remanded the cause to the District Court with a direction to enter a decree for the Negro plaintiff in conformity with *Baltimore City v. Dawson*, supra.

Other recent cases involving segregation of public facilities are *Department of Conservation*

and *Development v. Tate*, 352 U.S. 838, 77 S.Ct. 58, 1 L.Ed. 2d 56 (1956), in which the Court declined to review a judgment of the Fourth Circuit Court of Appeals, which judgment affirmed a decree enjoining the defendants from denying to any person of the Negro race by reason of his color the right to use and enjoy the facilities of a state park. In *St. Petersburg v. Alsup*, 353 U.S. 922, 77 S.Ct. 680, 1 L.Ed. 2d 719, the Supreme Court denied petition for certiorari filed by municipality to review a judgment of the Court of Appeals for the Fifth Circuit which affirmed a judgment of the District Court enjoining the defendant municipality and its officials from refusing to allow Negroes to use municipal beaches and swimming pools on the same basis as white citizens of the community.

The holding of the *Brown* case was elaborated in *Cooper v. Aaron*, 358 U.S. 178 S.Ct. 1401, 3 L.Ed. 2d 5. In the *Aaron* case the Court left no doubt that the decisions of the Supreme Court in interpreting the Constitution of the United States are the supreme law of the land, and have been since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60. The Court pointed out that the Madison decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution and that, therefore, the interpretation of the Fourteenth Amendment by the Supreme Court is the law of the land and is applicable directly to all courts within the United States. The Court reiterated the proposition that segregated schools denied the student the equal protection of the laws and also denied him due process of law. It is significant that in the *Cooper* case the school board had filed a petition seeking a postponement of a plan for desegregation on the principal ground of extreme public hostility engendered largely by the official actions of the governor and the legislature of the State of Arkansas. The Supreme Court held that the extreme situation which existed in Little Rock and the powerful and continued hostility of the governmental officials and/or ordinary citizens were not grounds for the suspension of the Court's order. The Court said, "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law."

Another recent case showing the Supreme Court's trend toward eliminating all forms of

segregation is *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114 (1950), in which the Court held unanimously that the equal protection clause of the Constitution of the United States required that a Negro be admitted to the University of Texas School of Law. The same result was reached as to the School of Law of the University of Florida in *Hawkins v. Board of Control*, 350 U.S. 413, 76 S.Ct. 464, 100 L.Ed. 486 (1956).

The separate but equal doctrine of *Plessy v. Ferguson* would now appear to have no vitality in the field of public transportation in which the doctrine was originally announced. *Browder v. Gayle*, *supra*, and its history in the Supreme Court, *supra*, would appear to be a positive mandate that state statutes requiring segregated bus facilities are as a matter of fact unconstitutional by virtue of the due process clause and the equal protection of the laws clause of Section One of the Fourteenth Amendment to the Constitution of the United States. This is on the theory that segregated facilities are inherently unequal and that the forced use of them is such a deprivation of basic civil liberty that it amounts to a denial of due process of law. This is the rationale of the *Brown* case and is at least tacitly the rationale of the *Browder* case, where, as above mentioned, the Court delivers no opinion, but significantly cites the *Brown* case as an authority for the Court's ruling and upholding the unconstitutionality of Alabama's segregation statutes as applied to bus transportation.

The only serious arguments which have been advanced in recent years regarding the constitutionality of the public segregation statutes have in large measure had as their basis the exercise of the police power of the state to prevent public violence, etc. This argument falls apart when one views the Court's reaction to the Little Rock violence as expressed in *Cooper v. Aaron*, *supra*. The Court says that violence or fears of violence are not proper factors to be considered in determining whether or not a given segregation statute violates the Constitution. It is saying that individual liberty is more important than some abstract concept of "public good." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, 26 ALR 2d 1378 (1952) is an example of the cardinal principle of law to the effect that emergencies don't make law and cannot constitutionally be allowed to. The facts in the *Youngstown Sheet and Tube Co.* case were that in the latter part

of 1951 a dispute arose between the steel companies and their employees over the terms and conditions of employment. Negotiations failed, and on April 4, 1952, the United Steel Workers of America gave notice of a nation-wide strike in the steel industry to begin at 12:01 A.M. on April 9, 1952. The President of the United States, believing that the work stoppage in the steel industry would immediately jeopardize our national defense mechanism, issued an executive order directing the Secretary of Commerce to take possession of the steel mills and continue operating them. The Secretary issued such orders, and the steel companies subsequently brought action against him in the District Court complaining that seizure was unlawful and that it violated the constitutional rights of the owners. The Court held that regardless of the seriousness of the proposed steel strike and regardless of the fact that it was a definite area of national emergency that the President still had no constitutional authority to order the seizure, that all authority of the executive, legislative and judicial branches of our government must come from the Constitution and that, therefore, the seizure was invalid. In other words, the Court said that simply because the seizure of the steel industry appeared to be a matter which was necessary at the time, it did not necessarily have any constitutional vitality.

It is interesting to note that in *Evers v. Dwyer*, 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed. 2d 222 (1958), the Court, while concerned solely with the question as to whether or not *Evers*'s case was a "controversy" contemplated by the Declaratory Judgment Act, nevertheless made this statement: "We do not believe that appellant, in order to demonstrate the existence of an 'actual controversy' over the validity of the statute here challenged, was bound to continue to ride the Memphis buses at the risk of arrest if he refused to seat himself in the space in such vehicles assigned to colored passengers. A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability." The last sentence is expressly important in view of the fact that the Court then proceeds to cite *Gayle v. Browder*, *supra*. It would thus appear that there was at least a suggestion on the part of the Court that it considered Tennessee's statute unconstitutional.

The only question remaining is that since this is a hearing on probable cause to be shown for the issuance of a warrant or warrants, and probable cause has been shown by competent witnesses, what is the duty of the court? Is it to issue the warrants and then make a decision based on the constitutional question, or can the court, in its discretion refuse to issue the warrants?

The question seems to be answered in the case of *UNITED STATES v. WINGERT*, 55 F.2d 960.

"Those accused of crime have two dearly bought rights now confirmed to them by the practice of a quarter of a millenium. One is the right to a fair trial, and the other to the equal and even more valuable right of protection from arrest except on probable cause and from the ignominy, loss of time, and expense following unfounded accusations. The latter is afforded by the provision of the Fourth Amendment and the practice that no one shall be put on trial until some responsible official or tribunal has found that he should be so tried. The question then arises of whether one should issue as a matter of course or whether the court may lawfully exercise its judgment before issuing it.

In practice, such warrants are issued whenever there is, as there usually is, justification for the issue. The question before us is whether, after hearing the proof the committing magistrate is of the opinion that there is no case made out against the defendant, the court is nevertheless bound to issue a warrant.

If the court has no power to refuse a warrant, of course, it must issue, but there is something repellant in the thought that a court is bound to deprive any one of his liberty when upon such inquiry the judgment of the court would be that such deprivation would be unwarranted.

The question raised is the naked question of whether the court has any discretionary control over the issuance of a warrant or must issue it."

The court held the duty of the court is judicial and not ministerial. The Fourth Amendment and our proud boast that we are the subjects of laws and not of men has behind it the actual experiences of the people whose system of criminal jurisprudence we have in larger part appropriated. It means that no man, and a Judge no more than any other man, governs us, nor can he deprive us of our liberty.

We are governed by the law, and no warrant can lawfully issue for our arrest except as the

law prescribes. Constitutions, however, more than statutes, mean what they say. They mean what they mean, and they mean what the courts find them to mean.

No precedent has been brought to my notice, and the industry of counsel has discovered none, for a court to issue a warrant after the court has found that a warrant should not issue.

The petition for a warrant is denied as presented. This is in effect a final judgment as much as quashing of an indictment, and I hope is the proper subject of review.

This 24th day of April, 1961.

ORDER DISMISSING PETITION AND DENYING WARRANT

This cause came on to be heard upon the sworn petition of the above petitioners praying that a warrant issue and be served upon Memphis Transit Management Company, a Tennessee corporation, for violation of Section 65-1708 of the Tennessee Code, being a "small offense" within the meaning of Section 40-408 of the Tennessee Code, and therefore coming within the jurisdiction of this court under said section, and within its powers as a magistrate under Section 40-603 of the Code of Tennessee;

And the court having considered said petition and the entire record in the case, including the regulations under which said Memphis Transit Management Company has operated since January 8, 1961, as reflected by Exhibit 1 introduced in evidence at the hearing, and the number of buses operated by said Memphis Transit Management Company on each day from January 8, 1961, through April 20, 1961, as reflected on Exhibit 2 introduced in evidence at the hearing, both of which are hereby made a part of the record in the case, by stipulation of the parties, as statements reduced to writing and signed in accordance with Sections 40-606 and 40-1112 of the Code of Tennessee (they being all the evidence presented in the case), and having heard argument by counsel for petitioners and by counsel for petitioners and by counsel for Memphis Transit Management Company in open court, and considered written briefs filed by counsel for each of said parties, and the written opening statement filed by counsel for petitioners (which is hereby made a part of the record in this case) finds that while there is probable cause to believe that the Memphis Transit Management Company has failed to set apart or

designate a separate portion of buses operated by it for the accommodation of white and colored passengers, there is no probable cause to believe that said act constitutes a crime under the laws and statutes of the State of Tennessee and more particularly under Section 65-1708 of the Code of Tennessee, due to the fact that such statute has been held by the Criminal Court of Shelby County, Tennessee, on April 21, 1961, Honorable Sam Campbell presiding, not to apply to buses which do not run on rails, and further due to the fact that said statute is unconstitutional under the Fourteenth Amendment to the Constitution of the United States, and therefore void, invalid and unenforceable, all as more fully set forth in the Memorandum Opin-

ion of this court attached hereto and made a part of this order, and incorporated herein by reference. The court accordingly, exercising the discretion vested in it as a magistrate under Section 40-606 of the Code of Tennessee, finds that the petition should be dismissed, the warrant prayed therein be denied, and Memphis Transit Management Company discharged.

IT IS THEREFORE ORDERED that the petition of the above petitioners be, and the same hereby is, dismissed; that the warrant sought therein be and the same hereby is denied; and that the said Memphis Transit Management Company be and the same hereby is discharged. Written objections and exceptions of petitioners are hereby made a part of this record.

TRANSPORTATION

Interstate Commerce—Alabama

UNITED STATES v. U.S. KLANS, Knights of the Ku Klux Klan, Inc., et al.

United States District Court, Middle District, Alabama, Northern Division, May 20, June 2, 8, 1961, Civil Action No. 1718-N, _____ F.Supp. _____

STATE of Alabama ex rel. MacDonald GALLION, as Attorney General of Alabama v. John DOE, as President of the Congress of Racial Equality, et al.

In the Circuit Court of Montgomery County, Alabama, In Equity #35522, May 19, 1961.

SUMMARY: The United States brought an action in federal district court seeking to enjoin three Ku Klux Klan organizations and certain of their individual leaders from interfering with the flow of interstate commerce in the state of Alabama. A restraining order against the same defendants had previously been issued by the court on May 20, 1961. The facts were established: that in April, 1961, the Congress of Racial Equality (CORE), and other named organizations began the sponsorship of a series of bus trips through parts of the South, including Alabama, by Negro and white individuals riding together on interstate carriers; that the purpose of said trips was to demonstrate against the operation of racially segregated interstate carrier and terminal facilities; that on May 14, 1961, in Anniston, Alabama, one group of such riders became the object of violent acts partly or wholly committed by individuals in concert with the Ku Klux Klan; that further acts of violence were inflicted upon another such group by Klan members at Birmingham, Alabama; that on May 20, 1961, Montgomery, Alabama, police officials, knowing of these disturbances and of the approach of a group of the demonstrators toward Montgomery, failed to take action to ensure the safety of those persons; that upon their arrival in Montgomery, the riders were again met with acts of violence instigated by members and leaders of the Klan organizations. Finding that the public might otherwise suffer irreparable injury, the court issued the requested injunction, together with a second injunction prohibiting Montgomery city officials from refusing to provide the protection for the interstate passengers. Having further found that the sponsors of the bus trips were also causing undue interference with the free flow of interstate commerce, the court brought these parties into the case and issued a temporary order restraining them from sponsoring or encouraging further trips planned specifically to test segregation laws in

Alabama and from otherwise interfering with the flow of interstate commerce. On June 8, 1961, separate motions by the original defendants, asking either for extensions of time for filing motions and responsive pleadings or for dismissals, were overruled and denied by the court. On the same day, a motion by the sponsors of the bus rides that the restraining order be set aside was also denied; but a motion by the United States that it be relieved of presenting evidence against these groups was granted, and an attorney for the Montgomery city officials was appointed for that purpose. On June 12, 1961, the restraining order against the sponsors of the bus rides was allowed to die because of a technical error. Meanwhile, in separate proceedings in a state court, the attorney general of Alabama was granted an injunction against unnamed officials of the Congress of Racial Equality. Specifically prohibited was the "entry into, and travel within the State of Alabama, and engaging in the so-called 'Freedom Ride' and other acts or conduct calculated to provoke breaches of the peace. . . ." The documents in the federal case are first reproduced below in chronological order, followed by the state court petition and injunction.

Restraining Order of May 20, 1961 and Order to Show Cause

JOHNSON, District Judge.

It appearing from the verified Complaint of the United States that the Gulf Transport Company, Southeastern Stages, Inc., and the Greyhound Corporation are interstate motor carriers certified by the Interstate Commerce Commission to carry passengers in and through Alabama, and that they are required by law to provide safe and adequate service in connection with such transportation; that defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., their officers, members and agents, Alvin Horn, Robert M. Shelton, Lester C. Hawkins, and Thurman E. Ouzts, for the purpose of compelling segregation of passengers according to race, have by force, violence, and threats prevented, and are conspiring to prevent, interstate passengers from using without unjust discrimination the transportation services of Gulf Transport Company, Southeastern Stages, Inc. and the Greyhound Corporation in and through Alabama, and have willfully damaged and destroyed the property of said carriers and have threatened and intimidated the drivers employed by the carriers in their efforts to provide such services, and that said defendants have thereby caused and are causing irreparable injury to the United States consisting of the obstruction of and interference with the movement of interstate commerce, all before notice can be served on the defendants and a hearing had;

NOW, THEREFORE, IT IS ORDERED that U.S. Klans, Knights of the Ku Klux Klan, Inc. Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc. Alvin Horn, Robert Shelton, Lester C. Hawkins, and Thurman E. Ouzts

their officers, members, agents, employees and all persons acting in concert with them, be and they hereby are temporarily restrained from:

(a) Conspiring to interfere with the travel of passengers in interstate commerce through or in Alabama free from racial segregation and other unjust discrimination;

(b) Committing acts of violence upon, or threatening, intimidating, assaulting or harassing any passengers in interstate commerce in and through Alabama;

(c) Threatening, intimidating, or committing acts of violence upon or damaging the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., or the Greyhound Corporation, their officers, agents, employees or drivers on account of their having carried, attempting to carry or carrying passengers in interstate commerce, and

(d) Otherwise obstructing, impeding or

interfering with the free movement of interstate commerce in and through the State of Alabama.

It is further ORDERED that each of the defendants herein named appear before this

Court in the United States District Court House, Montgomery, Alabama, on May 25th, 1961, at 10:00 o'clock a.m. to show cause, if any he has, why a preliminary injunction should not be issued pending a trial on the merits.

Order of June 2, 1961

This cause is now submitted upon the motion of the plaintiff, United States, seeking to have this Court grant a preliminary injunction, enjoining the defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., a corporation; Alabama Knights, Knights of the Ku Klux Klan, Inc., a corporation; Federated Ku Klux Klan, Inc., an unincorporated association represented by Lester C. Hawkins; Alvin Horn, Robert M. Shelton, Lester C. Hawkins, Thurman E. Ouzts, and Claude V. Henley from interfering with the free flow of interstate commerce within the State of Alabama. This Court previously on May 20, 1961, issued a temporary restraining order enjoining and restraining U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., Alvin Horn, Robert Shelton, Lester C. Hawkins, and Thurman E. Ouzts, their officers, members, agents, employees, and all persons acting in concert with them, from conspiring to interfere with the travel of passengers in interstate commerce through and in Alabama; and from committing acts of violence upon, or threatening, assaulting, intimidating or harassing passengers in interstate commerce in and through Alabama; and otherwise obstructing, impeding or interfering with the free movement of interstate commerce in and through the State of Alabama.

The submission of this matter was after notice to each of these defendants, and the submission is upon the evidence of several witnesses, both in person and by affidavit, and the several exhibits to the testimony of those witnesses. Having heard and understood the evidence, this Court now proceeds to make the appropriate findings of fact and conclusion of law.

This Court has jurisdiction of this matter and has jurisdiction over each of the above-named parties under the authority of Title 28, §§ 1345 and 1392(a), United States Code Annotated, this latter section providing, "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts." The several

motions filed by the above-named defendants, seeking to have this action dismissed on the grounds that the Court does not have jurisdiction and that service of process was outside the territorial limits of this district, are due to be overruled and denied. A formal order of this Court will be entered accordingly.

From the evidence in this case, this Court specifically finds that the U. S. Klans, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the laws of the State of Georgia, but doing business in the State of Alabama and within this district; that Alvin Horn is the chief officer and administrative head of that organization; that the Alabama Knights, Knights of the Ku Klux Klan, Inc., is a corporation chartered under the laws of Alabama and is doing business within the State of Alabama and within this district; that Robert M. Shelton is the chief officer and administrative head of that organization. This Court further finds that Lester B. Sullivan is Commissioner of Public Affairs of the City of Montgomery and, as such, is responsible for the general supervision and administration of the Montgomery Police Department and for maintaining the peace and enforcing the law within the City of Montgomery; that Goodwin J. Ruppenthal is the Chief of Police of the City of Montgomery and, as such, is responsible, under the direction of Sullivan, for the operation of the Montgomery Police Department and for preserving peace and enforcing the law within the City of Montgomery.

This Court further finds that in April of 1961 and continuing until the present time an organization known as the Congress of Racial Equality, usually referred to as CORE, together with the Southern Christian Leadership Conference, the Student Nashville Non-Violent Movement, Fisk University, Nashville, Tennessee; Martin Luther King, Jr., of Montgomery, Alabama and Atlanta, Georgia; Ralph D. Abernathy of Montgomery, Alabama; Wyatt Walker, address unknown; F. L. Shuttlesworth of Birmingham, Alabama; and Solomon S. Seay, Sr., of Montgomery, Alabama,

acting in concert with other individuals and organizations, formulated plans for sending groups of individuals of both the white and Negro races by interstate motor carrier through the State of Alabama, including this district. The announced purpose of said trips was for determining whether facilities of interstate commerce, including motor bus and terminal facilities in Anniston, Birmingham and Montgomery, Alabama, were being operated on a racially segregated basis and, if so, to demonstrate peaceably against such operation, and by such demonstrations, through the cooperation of the press, to focus national attention on such operation of the motor bus and terminal facilities in these cities.

This Court further finds that on or about May 14, 1961, a group of such individuals was traveling in interstate commerce toward Birmingham in two groups—one group in a Greyhound bus and the other group in a Trailways bus; that on May 14, 1961, certain individuals, some or all of whom were conspirators with or members of the U. S. Klans, Knights of the Ku Klux Klan, Inc., and the Alabama Knights, Knights of the Ku Klux Klan, Inc., by force, threats and violence, intimidated the passengers on one of the buses and destroyed the bus at or near Anniston, Alabama; that said intimidation of the passengers and destruction of this bus by said conspirators was in furtherance of the conspiracy to prevent the passengers on the bus from carrying out their announced and intended purposes. This Court further finds that on May 14, 1961, upon the arrival in Birmingham of the Trailways bus referred to above, the U. S. Klans, Knights of the Ku Klux Klan, Inc., certain of its members, the Alabama Knights, Knights of the Ku Klux Klan, Inc., certain of its members, and other conspirators, unlawfully beat, assaulted, intimidated, threatened and harassed certain of the passengers who had alighted from this bus at the Trailways bus terminal.

This Court further finds that on May 20, 1961, it was a matter of public knowledge in Montgomery, Alabama, and was known to the Montgomery Police Department in Montgomery, Alabama, that a Greyhound bus carrying a group of white and Negro college students (which students had announced the purpose of riding through the State of Alabama, including Montgomery, on an interstate carrier, to determine whether they could use the instrumentalities of interstate commerce on such trip without racial

segregation, or other illegal discrimination, and to demonstrate against any such discrimination should it occur) was en route from Birmingham to Montgomery. This Court finds that the Montgomery, Alabama Police Department was advised, through Spencer Robb, an agent of the Federal Bureau of Investigation of Montgomery, Alabama, that the bus carrying these passengers had left Birmingham at approximately 8:30 a.m.; and that this advice was given Acting Chief Marvin Stanley of the Montgomery Police Department by this agent of the Federal Bureau of Investigation at approximately 9:30 a.m. on the morning of May 20, 1961. The Court further finds that the Montgomery Police Department was aware of the fact that this bus had left Birmingham and was aware of the fact that certain difficulties had been encountered in Birmingham, Alabama, on May 14, 1961, when a similar group had arrived in Birmingham, Alabama. This Court further finds that a Montgomery Police Department officer, Detective Shows, stated to a reporter for The Montgomery Advertiser on the morning of May 20 that the Montgomery police "would not lift a finger to protect" this group. The evidence is abundantly clear and this Court specifically finds that Lester B. Sullivan, as Police Commissioner, was advised by Floyd Mann, Director of the Alabama Department of Public Safety, on the morning of May 20, 1961, that the bus in which this group was riding was en route from Birmingham to Montgomery, Alabama, and had reached a point twelve to fourteen miles from the city limits of Montgomery, Alabama, at approximately 10:00 a.m. The likelihood of violence was known to the Department of Public Safety, and that Department, acting through its head, Floyd Mann, had taken the necessary precautions to protect this bus from Birmingham to the city limits of Montgomery, Alabama, by assigning sixteen highway patrol cars and one airplane to accompany this bus from city limits to city limits. Through various sources, Sullivan and the Montgomery Police Department, through Sullivan, were aware of the explosive situation that existed in this area with reference to these riders, and with that knowledge did not take any of the usual precautionary measures to keep down violence in the City of Montgomery upon the arrival of this bus. Police Commissioner Sullivan, with this information—according to Police Officers Swindle, Moody, Lofton, Smith, Parham, and others—had not even alerted the Mont-

gomery City Police Department on this morning of May 20 and no special plans had been made by the Montgomery City Police Department to ensure the safety of the group of students, to prevent unlawful acts of violence upon their persons, and to ensure the safe conduct of these groups of interstate travelers. This Court specifically finds that the Montgomery Police Department, under the direction of Sullivan and Ruppenthal (Acting Chief Stanley, upon behalf of Ruppenthal) willfully and deliberately failed to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons. This lack of protection on the part of the city police of Montgomery continued even after the arrival of the bus. From the testimony of witnesses and the radio log of the Police Department, no police car was dispatched to the area of violence until car No. 19 (with two officers) was sent at 10:33 a.m. "to investigate." At 10:37 a.m., car No. 25 was also sent to investigate. It is significant that none of the officers in these two cars testified in this case. At 10:30 a.m., car No. 29 was sent to the general area "to direct traffic." The police dispatcher's radio log does not reflect that any other help was sent by the dispatcher to the station until 11:24 a.m.

This Court further specifically finds that the U. S. Klans, Knights of the Ku Klux Klan, Inc., and the Alabama Knights, Knights of the Ku Klux Klan, Inc., through certain of their leaders and members, conspired to and did commit acts of violence upon these interstate student-passengers or damage to the buses in Anniston, Alabama, and in Birmingham, Alabama, on May 14, 1961, and in Montgomery, Alabama, on May 20, 1961. This Court further finds that the defendant Henley and the defendant Ouzts acted in concert with the Klan groups herein named to commit acts of violence upon certain of the passengers and/or others in and around the passengers who had moved in interstate commerce and arrived at the Montgomery Greyhound bus terminal in Montgomery, Alabama, on May 20, 1961; that the actions of Henley and Ouzts were of a threatening and intimidating nature; that they committed acts of violence upon either passengers or newsmen, or both, at or near the bus that had brought these students to Montgomery, Alabama; and that said acts of violence were committed by the said Henley and Ouzts for the purpose of interfering with the travel of passengers in interstate commerce

through Alabama and for the purpose of obstructing, impeding and interfering with the free movement of interstate commerce in and through Alabama. This Court specifically finds that the actions of the U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Robert M. Shelton as chief officer and administrative head of the Alabama Knights, Knights of the Ku Klux Klan, Inc., and Alvin Horn as chief officer and administrative head of the U. S. Klans, Knights of the Ku Klux Klan, Inc., conspired and acted to interfere with the travel of passengers in interstate commerce on May 14 and May 20, 1961, and on said dates obstructed, impeded and interfered with the free movement of interstate commerce in and through the State of Alabama and in and through this district.

Pursuant to the above findings, this Court now concludes that this action is brought by the United States to protect the interests of citizens of the United States in the free and unobstructed movement of interstate commerce and in the exercise of the constitutional power of the United States over such commerce. This Court further concludes that the injury to the public that would possibly flow from this Court's denying this preliminary injunctive relief would be irreparable, and, further, that there will be no injury to the defendants if a preliminary injunction is issued.

The leading case on this question of the United States' being entitled to equitable relief against the unlawful obstruction of or interference with the free flow of interstate commerce is *In re Debs*, 158 U.S. 564, 568. The Supreme Court in that case concluded with a statement that is particularly applicable to the situation this Court is now faced with:

"... while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it

from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control."

See also *Robbins v. United States*, 284 F. 39; *Perko v. United States*, 204 F. 2d 446, and other cases therein cited.

The failure of the defendant law enforcement officers to enforce the law in this case clearly amounts to unlawful state action in violation of the Equal Protection Clause of the Fourteenth Amendment. The fact that this action was of a negative rather than an affirmative character is immaterial. Only recently the Supreme Court stated in *Burton v. Wilmington Parking Authority*, et al., 365 U.S. 715:

"But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction . . . the State . . . has elected to place its power, property and prestige behind the admitted discrimination."

The willful and deliberate failure on the part of the law enforcement officers was also unlawful in that it deprived the student-passengers and other passengers of their rights without due process of law. It is a settled proposition that transportation of passengers in commerce and the right of a passenger to travel in commerce is a right of citizenship which cannot be deprived without due process of law under the Fifth Amendment to the Constitution of the United States. See *Kent v. Dulles*, 357 U.S. 116.

This Court now further concludes that it is proper and necessary in this case to enter an order enjoining the U. S. Klans, Knights of the Ku Klux Klans, Inc.; Alabama Knights, Knights of the Ku Klux Klan, Inc.; Alvin Horn as the

chief officer and administrative head of the U. S. Klans, Knights of the Ku Klux Klan, Inc.; Robert M. Shelton as the chief officer and administrative head of the Alabama Knights, Knights of the Ku Klux Klan, Inc.; Thurman E. Ouzts, Claude V. Henley, their agents, employees, officers, members, and all persons acting in concert with them from:

- (1) Conspiring to interfere with the travel of passengers in interstate commerce through Alabama free from racial segregation and other unjust discrimination;
- (2) Committing acts of violence upon, or threatening, intimidating, assaulting or harassing any passengers in interstate commerce in or through Alabama;
- (3) Threatening, intimidating, committing acts of violence upon or injuring the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., the Greyhound Corporation, their agents, officers, employees or drivers, on account of their carrying, attempting to carry or having carried passengers in interstate commerce without unjust discrimination; and
- (4) Otherwise obstructing, impeding, or interfering with the free movement of interstate commerce in and through the State of Alabama.

This Court further concludes that it is appropriate and necessary in this case to enter an order enjoining Lester B. Sullivan as Commissioner of Public Affairs of the City of Montgomery and, as such, responsible for the general supervision and administration of the Montgomery Police Department and for maintaining the peace and enforcing the law within the City of Montgomery, and Goodwin J. Ruppenthal, Chief of Police of the City of Montgomery, their officers, agents, employees, and all those acting in concert with them, from failing or refusing to provide protection for all persons traveling in interstate commerce in and through the City of Montgomery, Alabama.

The defendants Sullivan and Ruppenthal have, through their attorneys of record, petitioned this Court orally and in writing to issue a temporary restraining order against the Congress of Racial Equality, whose main address is 38 Park Row, New York City, New York, and which organiza-

tion has done and is doing business in Alabama; the Southern Christian Leadership Conference, an unincorporated conference, which has done and is doing business in Alabama; Ralph D. Abernathy (a resident of this district), individually and as an officer in the Congress of Racial Equality and in the Southern Christian Leadership Conference; the Montgomery County Jail Council, an unincorporated council in Montgomery, Alabama; Ralph D. Abernathy as an officer and member of said council; the Student Nashville Non-Violent Movement, an unincorporated association of Nashville, Tennessee, which has and is doing business in Alabama and in this district; Martin Luther King, Jr., individually and as the president of the Southern Christian Leadership Conference; and Wyatt Tee Walker, individually and as the executive director of the Southern Christian Leadership Conference. In support of this petition to bring these individuals in this case and to issue a temporary restraining order against them, restraining them from using the various interstate commerce carriers in this State and in this district for the purpose of causing dissension and disturbances, which dissension and disturbances cause an undue burden and undue restraint on the free flow of commerce in this State and in this district, the testimony taken under oath before this Court in this hearing is offered. Petitioners specifically rely upon the testimony of two witnesses who are officials for the Greyhound Lines.

The carriers involved in this cause, Gulf Transport Company, Southeastern Stages, and the Greyhound Corporation, having been authorized by the Interstate Commerce Act and by the terms of their certificates from the Interstate Commerce Commission, are required to provide safe and adequate service, equipment and facilities for the transportation of passengers in and through the State of Alabama. The bus terminals and the terminal facilities in Montgomery, Birmingham and Anniston are an integral and regular part of the interstate transportation provided and required to be provided by these companies.

As has already been observed by this Court, the actions of the several defendants in the use of violence, force, threats, intimidations and harassment operate to impede the movement of passengers during the course of interstate bus journeys. These actions forcibly obstruct and

impede interstate commerce, and such actions are due to be halted.

Those who sponsor, finance and encourage groups to come into this area with the knowledge that such publicized trips will foment violence in and around the bus terminals and bus facilities are just as effective in causing an obstruction to the movement of bona fide interstate bus passengers as are those defendants named in the Government's complaint. This Court now specifically finds that the so-called "Freedom Riders" and other like groups have been and are being sponsored, financed, and assisted in their actions by representatives and members in this area of the Congress of Racial Equality (CORE); the Southern Christian Leadership Conference; Ralph D. Abernathy, individually and as an officer in the Congress of Racial Equality and in the Southern Christian Leadership Conference; the Montgomery County Jail Council, and Ralph D. Abernathy as an officer and member of said council; the Student Nashville Non-Violent Movement; Martin Luther King, Jr., individually and as the president of the Southern Christian Leadership Conference; Wyatt Tee Walker, individually and as the executive director of the Southern Christian Leadership Conference; and representatives and other members of the organization called Southern Christian Leadership Conference who also reside or engage in activities in this district and State. This Court recognizes that this sponsorship, even though it is agitation within the law of the United States, is agitation that constitutes an undue burden upon the free flow of interstate commerce at this particular time and under the circumstances that exist in this State and district; for instance, the making of unnecessary additional facilities and buses available for these non-bona fide interstate trips, requiring the carriers to run extra schedules, and coordinating these schedules with armed escorts.

The fact that this agitation on the part of the members and representatives of the Congress of Racial Equality, the Southern Christian Leadership Conference, and the others named, is within the law of the United States and is activity that may be one of the legal rights belonging to these individuals as citizens of the United States, the right of the public to be protected from the evils of their conduct is a greater and more important right. As the Supreme Court of the United States so aptly put it in *American Communications Assn. v. Douds*, 339 U.S. 382:

"And Government's obligation to provide an efficient public service, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and its interest in the character of members of the bar, *In re Summers*, 325 U.S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment. And see *Giboney v. Empire Storage Co.*, 336 U.S. 490, 499-501 (1949). We have never held that such freedoms are absolute. The reason is plain. As Mr. Chief Justice Hughes put it, 'Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.' *Cox v. New Hampshire*, supra at 574."

The activity of the Congress of Racial Equality representatives and those acting in concert with them in this district and within this State, the activity of the Southern Christian Leadership Conference representatives and those acting in concert with them in this district and within this State, the Student Nashville Non-Violent Movement and those acting in concert with them, individuals F. L. Shuttlesworth, Ralph D. Abernathy, Solomon S. Seay, Sr., Martin Luther King, Jr., Wyatt Tee Walker, and those acting in concert with these individuals in sponsoring, encouraging, assisting and publicizing the so-called "Freedom Riders," or other like groups who are presently engaged in "agitating within the law," is just as effectively causing an undue burden and restraint upon the free flow of interstate commerce in this State and district as is the activity of the other defendants in this case. ALL are due to be enjoined and/or restrained from such further activities that produce this evil result.

Even though these sponsors have not been named as defendants in this action by the United States, this Court is under a duty, in granting the relief sought by the United States, to go further in this particular case and grant the public complete relief insofar as possible.

It is well settled that a district court of the United States, sitting as a court of equity, has inherent power to grant complete relief in the matter before it in controversy. As the Supreme Court of the United States said in *Porter v. Warner Co.*, 328 U.S. 395:

"Unless otherwise provided by statute, all the inherent equitable powers of the Dis-

trict Court are available for the proper and complete exercise of that jurisdiction."

The Court further said that if the public interest is involved in a proceeding those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. As the Court went on to say:

"Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.' *Hecht Co. v. Bowles*, 321 U.S. 321, 329. It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. *Camp v. Boyd*, 229 U.S. 530, 551-552." (Emphasis added.)

As observed above, the right of the public to be protected from evils of conduct, even though the constitutional rights of certain persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by the courts of the United States. As the Supreme Court said in *American Communications Assn. v. Douds*, supra:

"* * * We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. *Kovacs v. Cooper*, 336 U.S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the health of children, *Prince v. Massachusetts*, 321 U.S. 158 (1944), or of the whole community, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and it may be offensive to the

moral standards of the community, *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890)."

This is not a restraining order enjoining individuals or groups who are traveling in interstate commerce through Alabama and through this district on bona fide trips. It is only directed to and against those organizations and individuals specifically named, or other like organizations or individuals acting in concert with them or acting as their agents or attorneys, that have been and are engaged in assisting, encouraging, financing and sponsoring groups and/or individuals in traveling in interstate commerce for the specific and announced purpose of testing and demonstrating. Such action has caused and is causing an undue burden and restraint on interstate commerce, resulting here in this State in the past few weeks in disrupting schedules of interstate carriers and causing bona fide interstate passengers to be subjected to violence, threats, intimidation and general inconvenience. While it is true that this violence is caused directly by the Klan groups and others acting in concert with them, and has been allowed by the willful failure of the police authorities to take the usual adequate, protective measures, it is equally true that the Congress of Racial Equality, the Southern Leadership Conference, Ralph D. Abernathy, F. L. Shuttlesworth, Martin Luther King, Jr., and others acting in concert with them, by their actions in financing and sponsoring and aiding and assisting such non-bona fide trips are directly causing an undue burden and restraint upon interstate commerce within the State of Alabama and within this district.

This Court recognizes that the threat of mob violence is no excuse for the failure of the Court to issue an injunction to protect the constitutional rights of private citizens. *Cooper v. Aaron*, 1958, 358 U.S. 1. However, that principle is not applicable in this case, since here the Court is issuing the injunction prayed for by the United States; however, as the Court has already observed, the granting of the injunction sought by the United States will only partly relieve the burden and restraint upon interstate commerce within the State and this district.

The *Cooper v. Aaron* case is also not applicable here, since in that case the district court, in following *Brown v. Board of Education*, 349 U.S. 294, had issued direct orders that certain stu-

dents be admitted to attend a designated school. In that case the mob violence was directly traceable to State action on the part of State officials in resistance to the *Brown* decision. In this district, this Court has already been called upon to decide some of the very constitutional rights these individuals traveling in interstate commerce seek to enjoy. Since a class suit has recently been filed asking this Court to determine plaintiffs' constitutional rights in this respect, continued testing of these laws or customs during the time this suit is pending in this Court can only serve to frustrate this pending litigation. This Court also recognizes the principle announced by the district court in *Bush v. Orleans Parish School Board*, 1960, 188 F. Supp. 916. The constitutional right in that case, as observed by the Court, had been granted by *Brown v. Board of Education* more than six years before the Court was faced with the situation that local conditions made compliance difficult. In this case, the constitutional right plaintiffs seek to invoke was only made definite by court decision last fall in *Boydton v. Virginia*, 364 U.S. 454. It has not yet been determined whether the local bus terminals fall within that classification that existed in the *Boydton* case.

In accordance with the foregoing, the preliminary injunction prayed for by the United States is due to be granted against U. S. Klans, Knights of the Ku Klux Klan, Inc., a corporation; Alabama Knights, Knights of the Ku Klux Klan, Inc., a corporation; Alvin Horn; Robert M. Shelton; Thurman E. Ouzts; Claude V. Henley; Lester B. Sullivan, Commissioner of Public Affairs of Montgomery; and Goodwin J. Ruppenthal, Chief of Police of Montgomery, their officers, agents, employees, members, and all persons acting in concert with them.

In accordance with the foregoing, a temporary restraining order, as authorized and provided by Rule 65 of the Federal Rules of Civil Procedure and as prayed for by part of the defendants in this action, is due to be issued to prevent immediate and irreparable injury to the free flow of interstate commerce within this State and within this district, against the following: Congress of Racial Equality, Southern Christian Leadership Conference; Ralph D. Abernathy, individually and as an officer in the Congress of Racial Equality and as an officer in the Southern Christian Leadership Conference; the Montgomery City Jail Council and Ralph D. Abernathy as an officer and member of said council;

the Student Nashville Non-Violent Movement; Martin Luther King, Jr., individually and as the president of the Southern Christian Leadership Conference; Wyatt Tee Walker individually and as the executive director of the Southern Christian Leadership Conference, F. L. Shuttlesworth and Solomon S. Seary, Sr., individually and as officers in one or more of the above-named organizations, and all others acting as their agents, officers, or members in or employees of, or acting in concert with them.

This Court is of the further conclusion and it is ORDERED that this cause be and the same is hereby amended to include as defendants each of the above-named individuals and organizations against whom the temporary restraining order is being issued.

This Court is of the further conclusion and it is ORDERED that the Honorable Hartwell Davis, United States Attorney for the Middle District of Alabama, and such other representa-

tive or representatives of the United States Department of Justice as may be designated by the Attorney General for the United States, be and each is hereby designated and appointed to present the evidence as *amicus curiae* at the hearing for a preliminary injunction, said hearing to be for the purpose of determining whether a preliminary injunction should issue, pending a trial on the merits against each of the individuals and organizations against whom this restraining order is being issued.

The United States Marshal for this district is ORDERED and DIRECTED to serve a copy of these findings, conclusions and order and a copy of the formal preliminary injunction and a copy of the formal temporary restraining order upon each of the defendants in this action against whom the preliminary injunction is being issued and upon each of the defendants against whom the temporary restraining order is being issued.

Preliminary Injunction of June 2, 1961

This cause coming on to be heard on the motion of the plaintiff for a preliminary injunction, and due notice having been given to the defendants, and the Court having considered the testimony offered in support of and in opposition to said motion for a preliminary injunction and being fully advised in the premises, and for the reasons set forth in the order of this Court entered on this date and pursuant thereto, it is

ORDERED, ADJUDGED and DECREED that, pending further order of this Court, the U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Alvin Horn, Robert M. Shelton, Thurman E. Ouzts, Claude V. Henley, their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them, be and they are hereby restrained and enjoined from:

- (1) Conspiring to interfere with the travel of passengers in interstate commerce in and through Alabama free from racial segregation and other unjust discrimination;
- (2) Committing acts of violence upon, or threatening, intimidating, assaulting or harassing any passengers in interstate commerce in or through Alabama;

- (3) Threatening, intimidating, committing acts of violence upon or injuring the persons or property of the Gulf Transport Company, Southeastern Stages, Inc., the Greyhound Corporation, their officers, agents, employees or drivers, on account of their carrying, attempting to carry or having carried passengers in interstate commerce without unjust discrimination; and

- (4) Otherwise obstructing, impeding, or interfering with the free movement of interstate commerce in and through the State of Alabama.

It is further ORDERED, ADJUDGED and DECREED that, pending further order of this Court, Lester B. Sullivan, Goodwin J. Rupenthal, their officers, agents, employees, and all those acting in concert with them, be and they are hereby restrained and enjoined from willfully failing to provide police protection for persons traveling in interstate commerce in and through Montgomery, Alabama.

It is further ORDERED, ADJUDGED and DECREED that this order shall be effective from and after 12:00 noon, June 2, 1961.

Temporary Restraining Order of June 2, 1961

For the reasons stated by the Court in its order made and entered this date in this cause, the organizations and individuals hereinafter named have caused and are causing irreparable injury to the United States and to the public, consisting of the obstruction of and interference with the movement of interstate commerce, all before notice can be served and a hearing had:

NOW, THEREFORE, IT IS THE ORDER, JUDGMENT AND DECREE OF THIS COURT that:

1. Congress of Racial Equality (CORE),
2. Southern Christian Leadership Conference,
3. Montgomery County Jail Council,
4. Student Nashville Non-Violent Movement, an unincorporated association,
5. F. L. Shuttlesworth,
6. Martin Luther King, Jr.,
7. Solomon S. Seay, Sr.,
8. Ralph D. Abernathy, and
9. Wyatt Tee Walker,

their officers, members, agents, employees and all persons acting in concert with them, be and each is hereby temporarily restrained from:

- (a) Sponsoring, financing, assisting or encouraging any individual or group of individuals in traveling in interstate commerce through or in Alabama for the purpose of testing the State or local laws as those laws relate to racial segregation;
- (b) Committing any act that is designed to cause violence upon, or threats towards any passengers in interstate commerce in and through Alabama; and
- (c) Otherwise obstructing, impeding or interfering with the free movement of interstate commerce—in the transportation of bona fide interstate passengers in and through the State of Alabama.

It is further ORDERED that each of the defendants hereinabove named appear before this Court in the United States District Courthouse, Montgomery, Alabama, on the 12th day of June, 1961, at 10:00 a.m., to show cause, if any he has, why a preliminary injunction should not be issued pending a trial on the merits.

Order of June 8, 1961

This cause came on to be heard on the 29th day of May, 1961. During the course of said hearing, several motions were made on behalf of one or more of the defendants and rulings on said motions were made in open court. In accordance with the order of this Court entered on June 2, 1961, the Court now proceeds to enumerate the various motions and to enter a formal order as to each of said motions.

On the grounds stated by the Court, in open court of May 29, 1961, the motion of the defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., Alvin Horn, Lester C. Hawkins, Federated Ku Klux Klan, Inc., to extend the time for filing motions and responsive pleadings, should be overruled and denied.

It is, therefore, the ORDER, JUDGMENT and DECREE of the Court that the motion of the defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., Alvin Horn, Lester C. Hawkins, Federated Ku Klux Klan, Inc., to extend the time for filing motions and responsive pleadings, be

and each of said motions by each defendant is hereby overruled and denied.

For the reasons stated in open court, the motion to dismiss filed by the defendant Claude V. Henley should be overruled and denied.

It is, therefore, the ORDER, JUDGMENT and DECREE of the Court that the motion of the defendant Claude V. Henley to dismiss be and the same is hereby overruled and denied.

This cause is also submitted to the Court upon the motion of the defendants Robert M. Shelton and the Alabama Knights, Knights of the Ku Klux Klan, Inc., U. S. Klans, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., filed herein on May 29, 1961, seeking to quash the subpoena duces tecum directed to each of them. It appearing to the Court that all the documents desired by the plaintiff were produced, it is the opinion of the Court that each motion to quash should be overruled and denied as being "moot."

It is, therefore, the ORDER, JUDGMENT and

DECREE of the Court that the motion of the defendants Robert M. Shelton and Alabama Knights, Knights of the Ku Klux Klan, Inc., U. S. Klans, Knights of the Ku Klux Klan, Inc., and Federated Ku Klux Klan, Inc., to quash the subpoena duces tecum directed to each of them, should be and the same is hereby overruled and denied.

This cause is also submitted to the Court upon the motions of the defendants Eugene T. Connor and Jamie Moore, objecting to plaintiff's motion to add them as parties defendant, and upon the further motions of the defendants Connor and Moore seeking to have this Court dismiss this cause as to each of them, and upon the further motion of the defendants Connor and Moore for a change of venue.

For the reasons stated in open court on May 29, 1961, it is the ORDER, JUDGMENT and DECREE of the Court: (1) that the objections of the defendants Connor and Moore to plaintiff's motion to add them as parties defendant, (2) that the motion to dismiss filed herein by the defendants Connor and Moore, and (3) that the motion for change of venue filed by the defendants Connor and Moore be and each of said motions and objections is hereby overruled and denied as to each of said defendants.

This cause is also submitted upon the motion of the defendants Lester B. Sullivan and Goodwin J. Ruppenthal for a severance and to dismiss this cause as to each of them.

Upon consideration of said motions and for the reasons stated in open court during the hearing of this cause, it is the ORDER, JUDGMENT and DECREE of the Court that each of said motions be and each is hereby overruled and denied as to each defendant.

It further appears that the defendants Sullivan and Ruppenthal filed in this court a motion to bring in the Congress of Racial Equality (CORE), the Southern Christian Leadership Conference, Montgomery County Jail Council, the Student Nashville Non-Violent Movement, F.

L. Shuttlesworth, Martin Luther King, Jr., Solomon S. Seay, Sr., Ralph D. Abernathy, and Wyatt Tee Walker as parties defendants. For the reasons set out in the order of this Court entered on June 2, 1961, and for the reasons stated in open court during the hearing of this cause, it is the opinion of this Court that the same should be granted.

It is, therefore, the ORDER, JUDGMENT and DECREE of the Court that the motion of the defendants Sullivan and Ruppenthal to bring in additional parties defendant, should be and the same is hereby granted.

At the close of the plaintiff's case, the defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., Alabama Knights, Knights of the Ku Klux Klan, Inc., Federated Ku Klux Klan, Inc., Alvin Horn, Robert M. Shelton, Lester C. Hawkins, Thurman E. Ouzts, Claude V. Henley, Eugene T. Connor, Jamie Moore, Lester B. Sullivan and Goodwin J. Ruppenthal, made a motion, separately and severally, to deny the issuance of a preliminary injunction against them as prayed for by the United States.

Upon consideration of each of said motions as to each defendant and for the reasons stated in open court, it is the ORDER, JUDGMENT and DECREE of the Court that the motions of the defendants Eugene T. Connor, Jamie Moore, Lester C. Hawkins, and the Federated Ku Klux Klan, and unincorporated association represented by Lester C. Hawkins, be and each of said motions is hereby granted.

It is the further ORDER, JUDGMENT and DECREE of the Court that the motions of the defendants U. S. Klans, Knights of the Ku Klux Klan, Inc., Alvin Horn, Alabama Knights, Knights of the Ku Klux Klan, Inc., Robert M. Shelton, Thurman Ouzts, Claude V. Henley, Lester B. Sullivan, and Goodwin J. Ruppenthal, to deny the issuance of a preliminary injunction as to each defendant, separately and severally, should be and each of said motions is hereby overruled and denied.

Order of June 8, 1961

This cause is now submitted to the Court upon the motion of the defendants Congress of Racial Equality, Southern Christian Leadership Conference, Student Nashville Non-Violent Movement, an unincorporated association, F. L. Shuttlesworth, Martin Luther King, Jr., Solomon

S. Seay, Sr., Ralph D. Abernathy, and Wyatt Tee Walker, seeking to have this Court set aside and vacate the temporary restraining order entered herein on June 2, 1961, against said defendants without notice to them.

As grounds for said motion, the defendants

say that no complaint was filed in this cause and that the oral allegations upon which the temporary restraining order was based do not state a claim against the defendants upon which relief can be granted. They further say that no irreparable injury has been shown and that it affirmatively appears that the defendants herein were at all times clearly exercising rights secured to them by the Constitution of the United States, Article 1, Clause 3, Section 8 (Commerce Clause) and the Interstate Commerce Act.

As appears from the order of this Court entered on June 2, 1961, the defendants were made parties defendant in this cause on motion made by the defendants Lester B. Sullivan and Goodwin J. Ruppenthal. This Court treated the petitioner as one to bring in parties defendant in order to grant complete relief in the premises. In support of the petition, the Court considered all the testimony offered at the hearing on the preliminary injunction, especially the testimony of two witnesses who are officials for the Greyhound Lines. The sworn testimony taken at the preliminary injunction hearing in this case, some of which was heard by one of the counsel representing the defendants in this case, is sufficient to meet the requirements of Rule 65(b), Federal Rules of Civil Procedure, pertaining to the issuance of a temporary restraining order. Furthermore, this Court was of the opinion that the principle laid down in *Porter v. Warner Co.*, 328 U.S. 395, that "if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced" was uniquely applicable in this particular proceeding.

This Court further finds that the other grounds of the defendants' motion to vacate the temporary restraining order are also without merit. As pointed out by the Court in the order of June 2, 1961, a class action has been filed and is now pending in this Court against certain bus lines, Montgomery city officials, the Attorney General of the State of Alabama, the Circuit Solicitor of Montgomery County, Alabama, the Sheriff of Montgomery County, Alabama, and members of the Alabama Public Service Commission.¹ It is of especial note that counsel rep-

resenting the defendants here also represent the plaintiffs in the class action which has been filed, and the incidents occurring in the City of Montgomery on May 20, 1961, at the Greyhound Bus Station are made a basis for the suit. These incidents, it might be noted, also formed the basis for the injunction suit by the United States and upon which this Court did issue a preliminary injunction on June 2, 1961, against certain Ku Klux Klan groups, two city officials and two other individuals. Whether the defendants against whom the temporary restraining order was issued were, in fact, exercising a constitutional right secured to them by the Constitution of the United States, Article 1, Clause 3, Section 8, and the Interstate Commerce Act, has not yet been determined, and to permit the continued testing of these laws, customs, policies, practices, or usages by those defendants named in the restraining order would only tend to frustrate this pending litigation. In fact, any demonstration, with the intent of interfering with, obstructing, or impeding the administration of justice in this pending suit by this Court, could form the basis for a criminal prosecution. See Title 18, § 1507, United States Code. This Court does not decide this point, but only mentions it to show that no possible injury can result from the issuance of the temporary restraining order by this Court on June 2, 1961.

Assuming, without deciding, that the conduct of those restrained is within the framework of rights guaranteed by the Constitution of the United States, such rights have never been held to be absolutes. *American Communications Assn. v. Douds*, 339 U.S. 382. As Chief Justice Hughes said in *Cox v. New Hampshire*, 312 U.S. 569, 574: "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses . . ."

This Court recognizes that it must beware lest it become a mere organ of popular intolerance.

state and intrastate motor carriers and in facilities and services of such terminals located in the City of Montgomery and in other cities located in the State of Alabama; from interfering with the plaintiffs and members of their class in the exercise of their constitutionally protected right to ride public interstate and intrastate carriers and to use the terminals of said carriers and the facilities and services of such terminals without segregation or discrimination because of race or color; and from arresting, harassing, intimidating, threatening, and coercing the plaintiffs and members of their class in exercising constitutionally protected rights.

1. This action is styled *John R. Lewis, et al. v. Southeastern Greyhound Lines, et al.*, and is Civil Action No. 1724-N. In this action the plaintiffs seek to enjoin the named defendants from continuing to pursue a policy, practice, custom or usage of segregating plaintiffs and members of their class on public inter-

However, this Court also recognizes that it is not sterile to protect society. When conditions show, as they do here, that individuals are indulging in provocations to violence, the Court is under a duty to make such action answerable to society. When the right of society to freedom from probable violence should prevail over the right of an individual to defy opposing opinion presents a problem that always tests wisdom and often calls for immediate and vigorous action to preserve public order and safety. This the Court has done in this case by restraining these defendants from further sponsoring or financing groups to test local customs and practices in motor carrier terminals. Certainly this Court has the power and the duty to keep the highways of interstate commerce from becoming the battleground for hostile ideologies to the destruction and detriment of public order.

This Court has always been open and is now open to redress the deprivation of any right, privilege or immunity guaranteed to citizens without regard to race, color or creed. This Court has been quick to grant relief in those cases where justice required it. See the leading case of *Browder v. Gayle*, 142 F. Supp. 707, affirmed 352 U.S. 903, which involved racial segregation on intrastate city buses in Montgomery, Alabama. Orderly compliance has been made in every case involving orders of this Court in so-called "civil rights" cases. There is no reason to believe

that orderly compliance will not be made with any order which might be issued in the pending case of John R. Lewis, et al. v. Southeastern Greyhound Lines, et al., Civil Action No. 1724-N.

Being acutely aware of the local conditions, this Court, sitting as a court of equity, must fashion its decrees within the framework of practical flexibility and adjust and reconcile public and private needs. This principle was laid down in *Brown v. Board of Education*, 1955, 349 U.S. 294, and seems to be uniquely applicable in this case. Constitutional liberties of the individual have never been won in the streets. Such liberties will not be won in this instance in that manner, and society is entitled to be protected from lawlessness which would tend to destroy all liberties.

Based upon the foregoing and for good cause shown, it is the opinion of the Court that the motion of the defendants to vacate and dissolve the temporary restraining order in this cause should be overruled and denied.

It is, therefore, the ORDER, JUDGMENT and DECREE of the Court that the motion of the defendants Congress of Racial Equality, Southern Christian Leadership Conference, Student Nashville Non-Violent Movement, an unincorporated association, F. L. Shuttlesworth, Martin Luther King, Jr., Solomon S. Seay, Sr., Ralph D. Abernathy, and Wyatt Tee Walker, should be and the same is hereby overruled and denied.

Order of June 8, 1961

It appears to the Court that this Court did, on June 2, 1961, issue an order directing the Honorable Hartwell Davis, United States Attorney for the Middle District of Alabama, and such other representative or representatives of the United States Department of Justice as may be designated and appointed, to present the evidence as amici curiae at the hearing for a preliminary injunction, said hearing to be for the purpose of determining whether a preliminary injunction should issue, pending a trial on the merits against each of the individuals and organizations against whom the temporary restraining order was issued.

Upon oral motion of the attorneys representing the United States, by and through the Department of Justice, requesting that the United States be relieved of the duty and responsibility of

presenting the evidence on said hearing, it is the opinion of the Court that the same should be granted. It is the further opinion of the Court that the Honorable Calvin Whitesell, attorney representing the defendants Lester B. Sullivan and Goodwin J. Ruppenthal, should be designated and appointed to present the evidence on the preliminary injunction hearing.

It is, therefore, the ORDER, JUDGMENT and DECREE of the Court that the motion of the attorneys representing the United States to be relieved of the obligation and responsibility to present the evidence on the hearing for a preliminary injunction against those individuals and organizations named in the temporary restraining order, should be and the same is hereby granted.

It is further ORDERED that the Honorable

Calvin Whitesell be and he is hereby designated and appointed to present the evidence at the hearing for a preliminary injunction, said hear-

ing to be for the purpose of determining whether a preliminary injunction should issue, pending a trial on the merits.

Petition for Injunction, May 19, 1961

Comes now the State of Alabama, acting by and through and on relation of its Attorney General, MacDonald Gallion, and would show unto this Honorable Court as follows:

1. That your petitioner brings this proceeding in the name of the State of Alabama, and as the Attorney General of the State of Alabama; that your petitioner is the duly elected and qualified Attorney General of the State of Alabama.

That the respondents herein designated as John Doe, as President of the Congress of Racial Equality, the Congress of Racial Equality, a Corporation, Richard Rowe, John Smith, Henry Jones, are respectively the President, whose name is otherwise unknown to your petitioner, of an organization or group or corporation known as the Congress of Racial Equality, the headquarters or main offices of such organization or group being, according to the best information and belief of petitioner, 38 Park Row, New York City, New York; that the Congress of Racial Equality is to the best of petitioner's knowledge, information and belief a corporation organized and existing under the laws of the State of New York, whose headquarters or main offices are at 38 Park Row, New York City, New York; that respondents Richard Rowe, John Smith, Henry Jones are members or officers of said corporation or are persons affiliated with or acting in concert with said organization or acting under the auspices of and directed by the said organization, a better name and description of said persons being otherwise unknown to your petitioner.

Your petitioner is informed and believes that General Counsel for the organization herein described as the Congress of Racial Equality is Carl Rochin, 38 Park Row, New York City, New York, and that said corporation or association has not registered and is not qualified with the Secretary of State of the State of Alabama to operate or do business within said State and petitioner requests service upon the Secretary of State of the State of Alabama under the provisions of Title 7, Section 199(1), Code of Alabama, as amended, and upon such other parties as are herein or may be identified.

2. Your petitioner avers that on or about the 14th day of May, 1961, respondents sponsored and are now sponsoring and continue to sponsor and to encourage and to participate in a certain movement, plan, or project, commonly called the "Freedom Ride" which includes the traveling to and entry into the State of Alabama of large numbers of persons, to-wit, approximately ten to one hundred or more, members of said organization or corporation or other persons affiliated with said organization, or directed by or encouraged by said organization; that the conduct of said persons traveling to and entry into the State of Alabama is such conduct calculated to provoke breaches of the peace throughout the State of Alabama; that such conduct threatens the safety, peace and tranquility of the people of the State of Alabama; and further that such conduct has already resulted in serious breaches of the peace, as set forth hereinafter:

A. That on or about the 14th day of May, 1961, a group of said respondents did enter into the State of Alabama by way of Greyhound and Trailway buses, operated by said bus companies, or other motor vehicles, and that as a result of said entry and travel, said respondents' conduct caused violence and threats of violence and breaches of the peace in the State of Alabama to persons and property in the State of Alabama, to-wit, the bombing and setting fire to a bus transporting respondents, resulting in damage or injury to persons or property;

B. That on another occasion, to-wit, the 14th day of May, 1961, such entry and travel into the State of Alabama by respondents did cause a breach of the peace at or near a public bus terminal in the City of Birmingham, which resulted in several persons being injured and which resulted in further threats of a breach of the peace in the State of Alabama;

C. That on another occasion, to-wit, the 17th day of May, 1961, another group of said respondents entered into the State of Alabama, and their presence and conduct did threaten to cause a further and imminent breach of the peace which resulted in the police authorities of the City of Birmingham being required to take said persons

into protective custody and causing said persons to leave the State of Alabama in order to prevent further violence or bloodshed.

3. Your petitioner is informed and believes and upon such information and belief avers that there is strong and convincing reason to believe that other respondents whose exact names are otherwise unknown to your petitioner, but who are members of, or officers of, said respondent corporation, or who are affiliated with said corporation, or who are directed by and encouraged by said organization, will continue to enter into the State of Alabama conducting themselves as above described, which will lead to further imminent danger to the lives, safety, peace, tranquility and general welfare of the people of the State of Alabama.

4. Petitioner avers that petitioner's remedy by law is inadequate, that the continued and repeated acts of respondents in entering into the State of Alabama, as herein alleged, will cause incidents of violence and bloodshed as has already occurred; that petitioner has not other adequate remedy to prevent irreparable injury to persons and property in the State of Alabama, and verily believes that such will occur if said respondents again enter into the State of Alabama so conducting themselves and if not restrained by this Court.

WHEREFORE, THE PREMISES CONSIDERED, your petitioner prays (1) that this Court will take jurisdiction of this bill of complaint and cause proper process to issue to the respondents herein, requiring them to plead, answer or demur within the time required by

law, or else to suffer a decree pro confesso. (2) That this court will issue a temporary or peremptory injunction enjoining and restraining and prohibiting the above named respondents, its officers, agents, members, employees, servants, followers, attorneys, successors, and all other persons in active concert or participation with the respondents, and all persons having notice of said order, from continuing any acts hereinabove designated, particularly the entry into and travel within the State of Alabama under the conditions described in this petition, or performing acts calculated to cause breaches of the peace in the State of Alabama. (3) That upon a final hearing the Court will issue a permanent injunction in accordance with the foregoing prayer for a temporary or peremptory injunction. (4) That your petitioner prays for such other, further and different relief which will be meet in the premises and in which he is in equity and good conscience entitled.

MacDONALD GALLION, AS
ATTORNEY GENERAL OF
ALABAMA

BERNARD F. SYKES, AS
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

JOHN BOOKOUT, AS
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ROBERT P. BRADLEY, AS
LEGAL ADVISER TO THE
GOVERNOR OF ALABAMA
PETITIONER AND SOLICITORS FOR PETITIONER

Temporary Injunction, State Court, May 19, 1961

A verified petition in the above-styled cause having been presented to me on this the 19th day of May, 1961, at 5:30 o'clock P. M. in the City of Montgomery, Alabama.

Upon consideration of said petition, and the public welfare, peace and safety requiring it, it is hereby considered, ordered, adjudged and decreed that a peremptory or temporary writ of injunction be and the same is hereby issued in accordance with the prayer of said petition.

It is further ordered, adjudged and decreed that the respondents and others identified in said petition, its officers, agents, members, em-

ployees, servants, attorneys, followers, and all other persons in active concert or participation with respondents and all persons having notice of this order are hereby enjoined and restrained from continuing any acts designated in the petition, particularly the entry into and travel within the State of Alabama, and engaging in the so-called "Freedom Ride" and other acts or conduct calculated to provoke breaches of the peace within the State of Alabama, and which act or conduct threaten the safety, peace and tranquility and general welfare of the people of the State of Alabama.

TRANSPORTATION**Interstate Commerce—Mississippi****STATE of Mississippi v. James L. FARMER.**

Municipal Court of the City of Jackson, Mississippi, May 26, 1961.

SUMMARY: Twenty-seven individuals were convicted in a Mississippi municipal court of violating the state "breach of the peace statute" for actions in connection with the "freedom rider" movement. The court found that defendants had chosen to challenge the state's segregation laws by open, flagrant defiance of them, instead of through an orderly legal proceeding, and that this conduct was calculated to incite mob violence. Ruling that their conduct had resulted in mob violence as they had intended it would, the court found defendants guilty as charged.

SPENCER, Judge.

The defendants in the cases before the Court have been charged with a violation of Section 2087.5 of the Mississippi Code, more commonly called the "breach of the peace statutes."

The statutes under which these charges are brought are per se valid statutes and I do not believe that there is any question but that they are constitutional as such. Every state and every government needs laws to regulate and prohibit, when necessary, the gathering of crowds and the prevention of mob violence, and I feel confident in saying that every state in the Union has similar statutes. The question presented to the court is whether or not the statutes were properly applied to the defendants here; in other words, have the defendants been improperly charged under a valid, constitutional statute so that their constitutional rights have been violated by the improper application of a valid law.

Now, what are the circumstances here prevailing; and we must take judicial notice of some of the things which have happened in our sister states.

It must be borne in mind that we are not here trying any segregation laws or the rights of the defendants to ride any buses in any particular seats or to eat in any particular places. These defendants have definite opinions as to their rights in these matters and the people of the State of Mississippi, as expressed in their laws and customs, have equally definite opinions otherwise. If any person, including these defendants, desire to challenge these laws and customs, they have their proper, orderly and legal procedure through the courts of this country so to do. Instead of availing themselves of their rights to engage in an orderly, legal procedure of adjudicating their rights as against

the Mississippi laws and customs, they chose to take the law into their own hands and engage in open, flagrant defiance of the laws and customs of Mississippi, and announced their intention so to do.

They made every move with inciting, inflammatory statements and press releases. They stayed long enough in various places to show that they were not traveling for the purpose of traveling, but were traveling for the purpose of inflaming the populace. They took part in demonstrations which were calculated to whip up the public frenzy. Their avowed purpose was to inflame the public, which will only result in those things which an inflamed public do. Even the Attorney General of the United States was so convinced that their conduct would lead to breaches of the peace, mob action and mob violence, that he dispatched some 700 Federal agents to follow in their wake and trail. What these defendants seem to say by their conduct is that they are not going to let any judiciary, Federal or State, resolve the questions present in Mississippi's present segregation laws and customs, but that they are going to inflame the people to fight it out among themselves.

The judiciary of Mississippi and the judiciary of no state will allow or condone its judicial questions being resolved by mob action or by conduct which tends to or is calculated to resolve its questions by mob violence. It is apparent by any impartial analysis of the conduct of these defendants that their conduct has already incited mob violence and that it was their purpose and intention so to do. It is further apparent that it was the intention of these defendants to resolve judicial questions by inciting breaches of the peace and mob violence, rather than by orderly legal process.

Accordingly, I find them guilty as charged.

The maximum penalty under the statute is a fine of \$200.00 and a jail term of 4 months. The prosecutor having recommended a penalty less

than the maximum, I will enter a fine of \$200.00 and a jail term of 60 days, with the jail term suspended.

TRANSPORTATION Passenger Seating—Alabama

Lillie BOMAN, et al., v. BIRMINGHAM TRANSIT COMPANY.

United States Court of Appeals, Fifth Circuit, April 14, 1961, No. 18187, _____ F.2d _____.

SUMMARY: On April 14, 1961, Judge Cameron entered his dissent in the above case, which had been decided on July 12, 1960, 280 F.2d 531, (5 Race Rel. L. Rep. 841).

Before TUTTLE, CAMERON and WISDOM, Circuit Judges.

Dissent

CAMERON, J.

I noted my dissent from the opinion rendered in this case July 12, 1960 and published in 280 F.2d 531. Following are the grounds upon which my dissents are based.

I.

A clear understanding of the issues presented by this appeal requires that their statement in the majority opinion be supplemented. The thirteen Negroes who filed this action met at a place of business in Birmingham to formulate plans for riding a city bus.¹ Written instructions had been drawn up and passed out outlining the deportment the group should adhere to in riding the bus. The meeting was noticed by one of the traffic officers of the City of Birmingham who also observed the group en route from the place of meeting to the place of boarding the bus.

When the bus pulled in to the regular stop at the curb the members of the group boarded it, took their seats at the front of the bus and were, as shown in the majority opinion, requested by the bus driver to seat themselves from the rear forward in compliance with the stenciled sign at the front of the bus: "White

Passengers Seat from Front, Colored Passengers from Rear." The court below found from undisputed proof, and the majority recognizes, that the approach was made in a courteous manner and was in the form of a request, and that there were no untoward incidents attendant upon the request of the bus driver and the refusal of appellees to comply with it. Pursuant to written instructions theretofore given him, the bus driver left the vehicle standing, and went to a nearby telephone and called the dispatcher's office reporting what had happened. An assistant superintendent answered the call, going immediately to the bus. He did not enter it, but talked with the driver through a window at his side. About that time the traffic officer came, in company with a captain of police of the City of Birmingham whom he had called. The latter ordered the two Transit Company employees to take the bus to the Company's garage. This order was given by the police because a crowd of several hundred people had gathered around the bus.

The police arrived ahead of the bus and when it reached the garage they, and probably two other members of the police force, boarded it. The driver was directed to repeat to each individual Negro the request that he move to the back of the bus. Four or five complied with this request, but these plaintiffs refused.

The police, on their own motion and without any suggestion from the Transit Company employees, arrested nine members of the group, and this ended whatever connection the Transit

1. The only one of the group who testified stated: "... But we did plan to go down and ride the buses to see whether or not that the city had discontinued their power as keep the segregated ordinance on the bus."

Company had with the episode. The court below found on undisputed evidence that all bus drivers were instructed not to call police, that nobody connected with the Transit Company had called the police, and that the Transit Company had no connection at all with what the police did (except as above set out). The court further found that, for a period of at least five years, no employee of the Transit Company had, under like circumstances, ever called the police (and the evidence showed without contradiction that requests similar to those made here had been promptly observed over the years).

The court below further found that the new buses, which had the signs stenciled on the front and rear ends, had been ordered some months before the change of ordinances by the City Commission of Birmingham; and found that no provision had been made in the new buses for color boards such as had formerly been used. This was an economy move based upon the fact that about one hundred fifty boards per month had theretofore been removed by passengers from the buses.

The episode, planned and provoked by appellants, occurred about one week after the repeal of the old ordinance and passage of the new. Some three weeks later this action was filed against appellee, Birmingham Transit Company and the three City Commissioners of Birmingham in their individual and official capacities. The City of Birmingham was not sued, although it was included in the answer of the Commissioners. It was eliminated as a party, however, by pretrial order of the court.² The relief asked against the remaining parties was a declaratory judgment defining the rights of the parties, adjudging Ordinance No. 1487-F of the Birmingham City Code, as applied to the plaintiffs and others similarly situated, to be unconstitutional as in violation of the Fourteenth Amendment, awarding plaintiffs money damages in the sum of \$100,000, and an injunction against the defendants from enforcing said ordinance "and any custom, practice, or usage which requires segregation of the races . . ." From this outline

2. "Plaintiffs state they are not making a claim for damages against the City of Birmingham and that the claim for damages against the individual defendants is on the basis that they were acting under color of office at the time complained. This proceeding is in no respect against the City of Birmingham, a municipal corporation, and plaintiffs agree that the averment 'that summons be issued to the City of Birmingham' be and the same is stricken."

of the complaint it is plain that plaintiffs were not primarily seeking a judgment annulling the ordinance because of its unconstitutionality, but were making incidental reference to this claim as the basis for the other relief sought.

The gravamen of the complaint is that appellee Transit Company was conspiring and acting in concert with city officials to enforce segregation under the ordinance quoted in the majority opinion.³

No proof at all was made tending to sustain these averments. The proof was all the other way; and the court below found that there had been no concert of action or conspiracy between the Transit Company and the other defendants or the policemen.⁴

The appellants argue before us that the overall facts here warrant or compel the finding that there was collaboration. The majority, however,

3. The charge is epitomized in these words in the complaint:

"The defendant, Birmingham Transit Company, acting under color of, and in compliance with said Ordinance hereinabove set out, has caused signs to be placed on its Buses directing Negroes to seat themselves from the rear of the Bus forward and whites to seat themselves from the front of the Bus backward; and has operated said Buses on the basis of racial segregation in violation of their rights guaranteed to plaintiffs and other Negro citizens under the Constitution and laws of the United States.

"The defendant, Birmingham Transit Company, acting in concert with the other defendants in this cause, have conspired and continue to conspire to deny these plaintiffs, and other Negroes similarly situated, rights guaranteed to these plaintiffs by the Constitution and laws of the United States.

"The defendant, Birmingham Transit Company, has stopped its Buses and called police officers of the City of Birmingham, and for the purpose of arresting plaintiffs has allowed, caused, and/or participated in the arrest of these plaintiffs, all in violation of their constitutional rights."

4. "The custom, usage and policy of the Transit Company as to segregated seating on its buses paralleled the segregation policy of the city up to the time of the repeal of the sections referred to, but, beyond that, any implication of concert of action or conspiracy arising from the pursuit of common or parallel policies disappears in the light of the evidence to the contrary.

"The bus drivers had received definite instructions not to call the police in the event an incident such as here involved arose. For at least five years no agent, servant, or employee of the Transit Company had called the police for help in the enforcement of the Company's rule relating to seating. There is no evidence that prior to that time they were ever called. In each instance of difficulty voluntary compliance with the seating rule had been secured. . . . The evidence fails to reveal any collaboration on the part of any employee of the Transit Company in the prosecutions that followed, and it does not show any ratification thereof."

apparently rejects that argument. It bases its opinion entirely on the fact that the Transit Company held a franchise from the City of Birmingham to use the streets and that this fact made the acts of the Transit Company, in asking the appellees to change their seats, State action.

It is pertinent to observe the averments of the complaint with respect to the franchise feature. The only mention of a franchise is contained in these words: "The defendant, Birmingham Transit Company, Incorporated, is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business in the City of Birmingham, and is engaged in operating within the corporate limits and police jurisdiction of said city, a bus line for transportation of passengers for hire, pursuant to a franchise issued by said City of Birmingham." Appellee admitted these averments in its answer. No evidence was introduced concerning the franchise, and there is no showing whether it was exclusive, mandatory of merely permissive, whether it was terminable at will, or as to any of the terms of the franchise.⁵

The point is that there is no evidence that the Transit Company had anything to do with the passage of this ordinance, or that it was advised of its existence, and certainly none that it had any notice that the policemen intended to invoke the ordinance or make any arrests, or that appellee collaborated in any way in such actions. The court below, based upon the only evidence in the record, found that appellee was not acting under the ordinance, but was proceeding pursuant to the written instructions it had given its bus operators in which it was stated that the ordinances having to do with separation of passengers on buses had been repealed.⁶ The entire bulletin, quoted in full in Note 2 of the majority opinion (280 F.2d 533-534), shows that bus operators were to go no further than to "request the cooperation of such passenger in complying with company rules to further the safe and peaceful handling of pas-

sengers." This request was to be made in a low voice and in a tactful manner. Reference was made, not to any ordinance, but "the reasonable rules that are now in effect with reference to seating in buses."

Based upon these facts and in the face of the finding by the court below which the majority opinion does not challenge, and without the citation of any authority,⁷ the majority here concludes that the promulgation and enforcement by polite request only of the rule set forth in the bulletins quoted in the majority opinion constituted a denial of plaintiffs' constitutional rights. The paragraph epitomizing the majority's conclusion reads thus:

7. The majority mentions *Shelley v. Kraemer*, 1947, 334 U.S. 1, but that case is authority for the appellee, not appellants. In fact, it was not listed as authority by appellants. That decision involved appeals from the Supreme Courts of Missouri and Michigan, wherein private parties had brought suits to enforce restrictive covenants in land deeds. These words are quoted from the Supreme Court's decision:

"These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. . . . [334 U.S. 4]

"Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

"We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . .

"... The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. . . . [ib. 13-14]

"The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. . . . Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. . . . [ib. p. 23] (Emphasis added.)

There the writings themselves were held to be not illegal. It was only the action of the State courts in enforcing the writings at the instance of one of the parties which the Supreme Court condemned as illegal.

5. Section 1487-F of the Birmingham Code gave the right to promulgate rules and regulations for the seating of passengers to all "carriers of passengers for hire operating in the City of Birmingham." But certainly Transit had the right to make such rules and regulations without such a Code provision, so long as it performed no function for the State in their enforcement.
6. "In view of the repealing of ordinances having to do with the separation of passengers on buses, the following instructions are set forth in order that such operator will be relieved of the responsibility for problems that might possibly be encountered."

"Of course, the simple company rule that the Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of patrons, would not effect a denial of constitutional rights *if not enforced by force or by threat of arrest and criminal action*. Where, as here, the city delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal, no matter how peaceable, quiet or rightful (as the court here held), such violation was, we conclude that the bus company to that extent became an agent of the State and *its actions in promulgating and enforcing the rule constituted a denial of plaintiffs' constitutional rights.*" [Emphasis added.]

This language of the majority, applied to the facts in this case, in my opinion, required that the decision of the court below be affirmed, not reversed. In *Shelley v. Kraemer* it was only action by the *State Courts* taken at the instance of the parties to the deeds which was declared illegal. Here, the State took no action at the instance of the Transit Company. The Company was a business institution organized and operated to make a profit for its owners. The only possible motive it could have had in promulgating the rule set forth in the majority opinion was to attract the maximum number of passengers by handling them in a peaceable manner and without friction and in a way most pleasing to its patrons. That is all it did. It sought no help from the State, and was attempting merely to seat its passengers in a way most beneficial to its own revenues and by polite request. There is no showing that any force would be attempted, or that the Transit Company would go any further than it had in previous years. It had never threatened the use of force, had never participated in the use of force, and it did not do so in this instance. The conclusion by the majority in the last quotation that its patrons "must" seat themselves as provided by the rule is not sustained by the language of the rule nor the evidence of the manner of its application.

The fact is that the police officers who used the force were not made parties to this action and that the court retained jurisdiction of the action insofar as it applied to the representatives of the State, the City Commissioners of

Birmingham. They are not before the Court. The appellants did not cross appeal from the action of the court below in retaining jurisdiction of this action insofar as it applied to the City Commissioners.

The mere existence of the city ordinance, with which appellee had no connection and which it did not seek to enforce and, as far as this record goes, never did intend to enforce, certainly cannot interfere with the application by appellee of its seating policy, accomplished, under the undisputed facts here, only by mutual consent. The situation here presented is much like that before the Supreme Court in the case of *United States v. Rains*, 1960, 362 U. S. 17. A group of officials of the State of Georgia attacked the constitutionality of the Civil Rights Act of 1957 on the ground that, under its terms, enforcement *could* be had against private individuals as well as State officers. The action there involved was taken against State officers only. The Supreme Court declined to consider whether the Act would be applied to private individuals, because there were no private individuals involved in the litigation before it. Here is some of its language (362 U.S. at 21):

"This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' . . . Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . ."

That case, in my opinion, controls this one. We do not have a situation where appellee used or threatened to use the newly adopted ordinance or to use force or threat of force in any form in the carrying out of its rule of voluntary seating. No other question is presented here.

The majority cites no authority for the proposition that, because a bus company is possessed of a franchise giving it the right to earn a profit from the use of the streets, the acts of the bus company are the acts of the State. Apparently it rests its announcement of this position upon *Browder v. Gayle, et al* (D.C. M.D. Ala. 1956), 142 F.Supp. 707, affirmed 352 U.S. 903, and *Flemming v. South Carolina Electric & Gas Co.*, 4 Cir., 1955, 224 F.2d 752. These cases do not, in my opinion, furnish any basis for the innovation the majority now seeks to import into the decision of civil rights cases.

In *Browder* the Montgomery City Lines, Inc. was admittedly enforcing State and municipal law requiring the segregation of races, compliance with which had been peremptorily demanded by the Alabama Public Service Commission in a written communication addressed to the Lines. Without dispute, it was acting in concert with the State of Alabama and the City of Montgomery in the enforcement of their laws, which the court declared unconstitutional. That holding does not touch the crucial point upon which this case has been decided. The evidence here shows without contradiction, and the court below found, that appellee was not engaged in enforcing any state law or city ordinance, but was seeking to give effect to its own private policy, established after the segregation ordinances had been repealed, and set forth in explicit terms in the two written bulletins quoted in the majority opinion. As I understand it, the majority does not take issue with this statement.

The same is true of *Flemming*.⁸ The clear language of the Court of the Fourth Circuit shows that what the Court was there considering was completely outside the question now before us: "It is argued that, since the driver is made a police officer of the state by section 58-1494 of the South Carolina Code, his action is not attributable to the defendant; but we think it is clear that he was acting for the defendant in enforcing a statute which defendant itself was required by law to enforce. . . . He was thus not only acting for defendant, but

also acting under color of state law." (224 F.2d . . .)

The appellee here was not acting under any state power or any state law or color thereof, but was seeking solely to procure by persuasion and agreement observance of a policy which it manifestly felt would insure to it maximum revenues.

In my opinion, the majority goes outside the evidence and contrary to the findings of the trial court⁹ in its statement (p. 535), "Where, as here, the City delegated to its franchise holder the power to make rules for seating of passengers and made the violation of such rules criminal, . . . we conclude that the Bus Company to that extent became an agent of the State and its actions in promulgating and enforcing the rule constituted a denial of the plaintiffs' constitutional rights."

The majority reads into these rules, which by their language show clearly that they are rules of the Bus Company only, the idea that they were promulgated pursuant to the city ordinance. And the trial court found that the Bus Company was merely proceeding on its own¹⁰ to insure a happy and peaceful relationship be-

9. The court below quoted the two bulletin orders No. 176 and 177, which Transit issued to its employees effective October 16th. A part of these two bulletins are for convenience copied here:

"As you have seen in the newspapers, the City Commission has unanimously repealed all bus segregation ordinances to become effective Thursday, October 16, 1958. Signs have been placed in front and rear of all of our buses which read as follows:

'White Passengers seat from front.

Colored Passengers from rear.'

"Every effort should be used to avoid conflicting problems. May we suggest that you use calmness and your very best judgment in handling any situation that might arise. . . .

"In view of the repealing of ordinances having to do with the separation of passengers on buses, the following instructions are set forth in order that each operator will be relieved of the responsibility for problems that might possibly be encountered.

"If instances should arise wherein passengers do not comply with the reasonable rules that are now in effect with reference to seating in buses the operator will approach the passengers involved and talk with them in a tactful manner and in a low voice, and request the cooperation of such passenger in complying with Company rules to further the safe and peaceful handling of passengers." [Emphasis added.]

10. "The custom, usage and policy of the Company as to segregated seating on its buses paralleled the segregation policy of the City up to the time of the repeal of the sections referred to, but, beyond that, any implication of concert of action or conspiracy arising from the pursuit of common or parallel

8. The per curiam opinion begins with these words: "This is an action for damages brought by a Negro woman against a bus company because the driver of the bus required her to change her seat in accordance with the segregation law of South Carolina . . . which she claimed to be violative of her rights under the 14th Amendment to the Federal Constitution."

tween its passengers, who by custom known to everyone, observed voluntary racial separation in all of the normal contacts between them. These findings of the court are not challenged by the majority as unsupported by evidence, or as being legally erroneous. They are the gist of this action, and they are, in my opinion, sound and their unexplained rejection by the majority is, in my opinion, completely without warrant.

II.

The starting point of most reasoning on this subject is the *Civil Rights Cases*, 1883, 109 U.S. 3, et seq., declaring the Civil Rights Act of March 1, 1875 unconstitutional as not being authorized by the Thirteenth or Fourteenth Amendments. The cases discussed generally the correlative rights and powers of the States and of the national government. One of them, *Robinson and Wife v. Memphis & Charleston R. R. Co.*, involved the right of the wife of a Negro to ride in the ladies' car. The full discussion of the questions before the Court in the dissent of Mr. Justice Harlan asserted that the holding by the railroad of a franchise was a sufficient justifica-

tion for federal intervention in connection with its said act of discrimination.

Dealing with "the legal rights of colored persons in respect of the accommodations, privileges and facilities of public conveyances, inns and places of public amusement," the dissenting opinion (109 U.S. pp. 36-41) sponsors the position that the public nature of these businesses invests the persons performing them with attributes of State agency so that their acts come within the inhibitions of the Thirteenth and Fourteenth Amendments, suggesting the idea (p. 36) that "the real and personal property necessary to the establishment and management of the railroad is vested in the railroad but it is in trust for the public."

Mr. Justice Bradley, speaking for the majority composed of the remaining eight members of the Court, rejected this argument in an extended opinion whose holdings may be summarized in a sentence found on page 14 of the report: "In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities." This rule of law has existed unimpaired to this day and the dissent of Mr. Justice Harlan has never found lodgement in subsequent cases. The case before us would escape the application of even this dissent since Transit had succeeded to no governmental rights or sanctions such as eminent domain, support by taxation, subjection to rate fixing and the like.

The Court below quoted an excerpt from *Browder v. Gayle*, 142 F.Supp. 707, affirmed, 352 U.S. 903, as supporting the views it expressed:

"In their private affairs, the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 2, . . . Indeed, we think that such liberty is guaranteed by the due process clause of that amendment."

The trial court also cited as supporting its holding the case of *City of Miami, Florida v. Garmon*, 1957, 151 F.Supp. 953, affirmed per curiam by this Court (1958), 253 F.2d 428. The district court had held that the case was improperly brought against the Miami Transit

policies disappears in the light of the evidence to the contrary.

"The bus drivers had received definite instructions not to call the police in the event and incident such as here involved arose. For at least five years no agent, servant, or employee of the Transit Company had called the police for help in the enforcement of the Company's rule relative to seating. . . .

"On the occasion in issue no one from the Transit Company called the officers. . . . No one connected with the Transit Company instigated, directed, requested or participated in the arrests. . . .

"Private parties, who may act independently with impunity, cannot escape liability where they actively assist agencies of a state government in depriving a person of rights guaranteed by the Fourteenth Amendment and the laws enacted thereunder. Although acting independently, a private party will also be liable if he acts under color of state law. On the other hand, it has been repeatedly held that the civil rights statutes do not have the effect of bringing under federal control private rights against invasion by individuals. . . .

"The customs of the people of a state is held not to constitute state action (See *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F.2d 845; and *Watkins v. Oaklawn Jockey Club*, D.C. Ark., 86 F.Supp.), and a custom is no more or less a custom because it finds expression in a formal rule. Whether segregated seating is secured by custom, policy or usage so long as its accomplishment is by voluntary adherence, divorced from state action, no violation of civil rights is presented. The fact that the custom has also found expression in an ordinance does not alter the principle stated. Otherwise, independent individual action would be interdicted by the mere existence of the ordinance. . . . [Emphasis added.]

Company and had dismissed the action as to said company.¹¹ The majority does not mention the *Garmon* case nor the quoted portion of the *Browder* case as the court below applied them, although I think under the trial court's handling of them they stand definitely athwart the path of the majority opinion here.

The majority does mention, without discussing beyond stating that they are not inconsistent with its present holding, two cases relied upon by the lower court, *Eaton v. Board of Managers of James Walker Memorial Hospital*, D.C., 1958, 164 F. Supp. 191, affirmed 4 Cir., 261 F.2d 521, certiorari denied 359 U.S. 984; and *Williams v. Howard Johnson's Restaurant*, 4 Cir., 1959, 268 F.2d 845. I find the principles there involved sufficiently close to those before us here to warrant discussing them briefly.

Eaton involved an action by three Negro doctors representing a class and seeking admission to practice medicine at James Walker Memorial Hospital as members of the "Courtesy Staff." Soon after 1881 a hospital had been established in the City of Wilmington, Delaware upon land owned by the city, with expenses of operation being divided sixty per cent by the county and forty per cent by the city. In 1900, one James Walker offered to build a modern hospital and did build one on the site of the one which was torn down. The new hospital was incorporated under a chapter of the Private Laws of 1901, with a board of managers, three of whom were appointed by the county, two by the city and four by said James Walker. The city and county conveyed the land to the board of management for hospital purposes.

At the outset the city and county paid the entire operating expense, but this was changed from time to time through 1951, after which support was furnished by private subscriptions, except for a per diem charge paid by city and county for charity patients. At the time of the filing of the action below only the county was

paying said per diem charge for charity patients. The district court dismissed the action for lack of jurisdiction, and the Court of Appeals affirmed. It was not thought that the donation of the land for free use by the hospital, its quasi-public nature and the payments made by the county of part of the upkeep sufficiently identified the hospital with state action to warrant application of the Civil Rights Statutes.

Williams involved a suit by an employee of the United States against Howard Johnson's Restaurant, member of a chain of restaurants, for injunction and declaratory judgment based upon his claim that he was deprived of his constitutional rights by the application of Virginia's long established custom of excluding Negroes from public restaurants, and the enforcement of state statutes requiring segregation of the races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage. A further claim was made that the restaurant was licensed by the State of Virginia, was situated along an interstate highway, and discriminated against Negroes in furnishing services to interstate passengers. The trial court dismissed the action for want of jurisdiction and the Court of Appeals affirmed.¹²

I agree with the action taken in each case, and I also agree with the conclusion of the court below here that the action taken in *Eaton* and *Williams* came nearer offending against the Civil Rights Acts than those involved in the present case. Here, the City of Birmingham had no connection with the operations of appellee, except that it issued a franchise or license to appellee to operate its buses along Birmingham's streets. Appellee performed no service which the City of Birmingham was under obligation to perform. All the city did was to pass an ordinance authorizing the appellees and all others carrying passengers for hire to promulgate rules of seating—a right Transit had without the ordinance. Race was not mentioned. Certainly the terms of the ordinance applied as much to white people as to colored people. The chief point is, however, that the appellee was not, as far as the proof goes, operating

11. Stating:

"... The decisions of the Supreme Court in civil rights cases of all types and kinds are directed to state (or city) officials acting in their official capacity and those decisions have not been directed to either private individuals or private business firms and indeed there is no constitutional prohibition affecting the freedom of private businesses to regulate their businesses within the law, nor is there any constitutional authority to impose upon them the burden to either enforce or not to enforce segregation in their private affairs."

12. And see also *Commonwealth of Pennsylvania, et al v. Board, etc. of Philadelphia*, 353 U.S. 230; *In re Girard College Trusteeship*, 138 A.2d 844 (Appeal to Supreme Court dismissed); and *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518.

under the ordinance and that it took no part in the enforcement of the ordinance.¹³

It is clear, therefore, that the thrust of the majority's holding is that appellee deprived appellants of their constitutional rights when it requested that white people seat themselves from front to back and colored people from back to front, with no provision for enforcement of the request save the mutual consent of the parties. Such a conclusion carries with it necessarily the holding that segregation by agreement is unconstitutional. As far as I am advised, no court has ever made such a holding, and all of the decided cases have held the contrary.¹⁴

It is noteworthy that it was left to a three-judge district court in this circuit (*Browder v. Gayle, supra*) to administer the *coup de grace* to *Plessy v. Ferguson*, 1896, 163 U.S. 357, a case directly in point with this one, decided by judges who had lived through the critical era following the War Between the States. The Supreme Court had been careful not to do that, saying in *Brown v. Board of Education*, 347 U.S. 494-495:

"Whatever may have been the extent of psychological knowledge at the time of

Plessy v. Ferguson, this finding [that segregation of white and colored children in public schools has a detrimental effect upon the colored children, engendering in them a sense of inferiority] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. . . ."

The "modern authority" listed by the Supreme Court as supporting this holding is confined to treatises upon psychology and social science, subjects which would hardly be considered in connection with a transportation case where children are not the parties primarily affected if affected at all.

And now it is this Court which takes this step, whose fundamental impact is further to debase the States and exalt the Federal Government in a very vital field.¹⁵

III.

And whither now? Having bridged all the chasms and mounted all the hurdles in our leap from the shoulders of *Browder*—much too slender a reed to support so heavy a weight—to the conclusion here reached by the majority, what vistas do we open for those who need but slight justification to extend the doctrines with which we are dealing? What about taxicabs, public haulers of household goods and property in

13. The fact is that there is no proof that the prosecutions brought by the officers were under the ordinance. The court records touching the prosecutions of appellants were not introduced. Under the testimony of the police officers the charges against appellants were confined to "disorderly conduct," covered by another ordinance, and the court below so found.

14. A recent decision of this Court, *Baldwin & Baldwin v. J. W. Morgan et al*, Feb. 17, 1961, . . . F.2d . . . , quotes from the opinion of the district court then under consideration this statement: "While no law, or custom or usage which is the equivalent of law, may compel the segregation of races in the area of public transportation, it is equally clear that people of good will of both races are free to observe traditions which for generations have been an intimate part of their way of life." And the same case refers to the decision of this Court in *City of Montgomery, Alabama v. Gilmore*, 1960, 277 F.2d 364-368-370, where, in order that the people of that city might follow the "obvious but important truism that there is certainly no law to prevent cooperation between peoples of all races," the decree of the lower court was modified so as to dissolve the injunction it had granted.

And see also: *Cohen v. Public Housing Administration*, 5 Cir., 1958, 257 F.2d 73, 78; *Avery v. Wichita Falls Independent School District*, 5 Cir., 1957, 241 F.2d 230, 234; *Kelley v. Board of Education of Nashville, etc.*, 6 Cir. 1959, 270 F.2d 209, 226; *Dove v. Parham, D.C. Ark.*, 1959, 181 F. Supp. 504, 513; *Browder v. Gayle, D.C. Ala.*, 1956, 142 F. Supp. 707, 715; *Briggs v. Elliot, D.C. S.C.*, 1955, 132 F. Supp. 776, 777.

15. The decision in *Baldwin v. Morgan supra* cites the case before us as authority for the *Baldwin* decision, but it is certain that *Baldwin* does not tend to support *Boman*. This language used by the Court in *Baldwin* differentiates it from the facts before us here: "Here the statute infuses the Commission with power to prescribe that carriers shall maintain separate waiting rooms and this power has been effectuated by the issuance of regulations that leave nothing to the imagination. The last order compels the posting of visible signs clearly indicating which waiting room is for whites and which is for colored. The state does not physically post the signs, it does so just as effectively through the instrument of the Terminal. The very act of posting and maintaining separate facilities when done by the Terminal as commanded by these state orders is action by the state."

Here, *Transit* was not acting under any order from the city and was not engaged in any cooperation with the city in the enforcement of any ordinance under which it might have been proceeding. *Transit* was engaged merely in persuading the members of the two races to cooperate with it in the observance of traditional patterns, obviously for the sole purpose of holding as much of the patronage of both races as it could.

general, vendors of hot tamales who peddle from their carts in the streets? They ply their trades only by obtaining a special license, a "franchise," from some agency of the state. And what of those who conduct their businesses for profit, only by obtaining special permits from a state agency to make deliveries over the public thoroughfares?

The answer is that the step from this decision to a declaration that all licensed dealers in merchandise or services in dealing with the public are engaged in business of such a public nature that their actions must be considered as actions of the states, is clearly comparable with the one the majority takes in the present decision. That the goal of those pressing for these drastic changes reaches far beyond what is here done is exemplified by a statement made by a Negro leader in a televised debate a few weeks ago.¹⁶

16. The public press carried excerpts from a debate conducted by the National Broadcasting Company over its television network on Saturday, November 26, 1960, between Reverend Martin Luther King, a Negro leader and President of the Southern Christian Leadership Conference, and Mr. James Kilpatrick, Editor of the Richmond News Leader and member of the Virginia Commission on constitutional government, with Mr. John K. M. McCaffery as Moderator. The stenographic transcript of this debate covers nineteen pages. A few excerpts from that transcript are reproduced here as representative of the attitude of those leading the so-called Sit-In Strikes as they relate chiefly to department stores operating lunch counters serving exclusively white patrons. Reverend King is quoted as saying in part:

"I would say that the sit-in demonstrations are justifiable because their ends are humanitarian, constructive and moral . . . I would be the first one to contend that there are certain sacred and basic rights that should be protected concerning private property, but I do not think this is the issue at this point. We are not dealing with property that is exclusively private. We are dealing with property that is privately owned but supported by, sustained by the public and which depends on the public for its very existence, and I think we have a great difference here. . . .

" . . . I think in disobeying these laws, the students are really seeking to affirm the just law of the land and the Constitution of our United States. I would say this, that all people should obey just laws, but I would also say, with St. Augustine, that an unjust law is no law at all . . .

When asked by Mr. Kilpatrick whether, if the Supreme Court should affirm the case of *Williams v. Howard Johnson Restaurant*, Reverend King and those led by him would abandon further efforts to sit-in, the latter responded in part:

"If the United States Supreme Court of the government of our nation issued a law, set forth a law or a decision stating that the public worship of God is unconstitutional, there would be a denial of the right of freedom of religion and to worship God publicly . . .

Mr. Kilpatrick asked then to go back to the question whether Reverend King would be in-

IV.

The proper solution of the problem with which we are dealing can be reached only if we keep in mind that it is exclusively a social problem, with political overtones. The question is not whether appellants are entitled to seats which are equally as safe, comfortable, desirable and adequate as those which white people are requested by appellee to take (about which there is no dispute in the evidence); it is whether appellants are entitled to sit in the same seat or mingle in close contact with passengers who may not choose to have such association. Freedom of association and choice of social companions have always been considered among the things which cannot be enforced by judicial decree, cf. *Baldwin et al v. Morgan et al supra*. Such choices must be made in the hearts of men. A Negro leader from Chicago recently expressed the idea in these words:

" . . . no society nor government lifts a people, but they must struggle, sacrifice, and climb themselves." ¹⁷

V

Since we are bound by no decisive legal precedent in deciding this case we should, in my opinion, consider all of the material facts and

clined to "call off all your troops and disband your school down there," if the Supreme Court should say that the sit-ins were illegal. Reverend King responded: "I go back to the argument, Mr. Kilpatrick, that an unjust law is no law at all."

17. Under the heading "Negro Baptist Leader Urges Racial Elevation," *The Jackson Clarion-Ledger*, Oct. 24, 1960, at page 7, reported a speech by the President of the National Baptist Convention thus: "Dr. J. H. Jackson, president of National Baptist Convention, told a Jackson State College Founders' Day audience Sunday there is too much talk of 'racial integration' and not enough of 'racial elevation'."

"A record crowd at the 83rd Founders' Day program at College Park Auditorium heard the Chicago pastor and president of the Convention of four million Negroes speak on 'The Task of Racial Elevation'."

"He said that no society nor government lifts a people, but they must struggle, sacrifice, and climb themselves. 'The center of the responsibility is with us,' he said."

"Negroes must 'be bold and frankly face their own shortcomings,' they must 'develop the technique of appreciating themselves and their talents, and be proud of their race,' and they must realize the cause is greater than individuals in it. . . .

"It is difficult for a race to face those things we still must conquer," he said. He added divisions among Negroes themselves still exist because they were brought from many tribes and cultures before they had a chance to unite as a race."

circumstances surrounding the socio-political problems with which we are dealing. Such an understanding and evaluation of what has happened in the past is necessary if we are to assess the components of this problem before us for solution in the present. There are those who do not subscribe to this view. Finding the present so unique in its problems, its thinking, and its attitudes, they are unwilling to devote prime attention to the accumulated wisdom of the ages. They think that to ponder upon the past is to give ear to the decadent and moribund.

It is my thought, and I believe the thought of the rank and file of the American people, that only by building upon the solid foundations of the past can true progress be made. If we abandon the past to achieve originality or modernity in a trifling sense, we forsake our heritage. We lose the advantage of all that has been learned at great cost over the ages, and start the struggle again from the bottom. I do not believe that recurrent haphazard or fortuitous change can be called progress; but that those who would completely discard the past and be completely contemporary do not believe in the possibility of real progress at all. Real progress can be achieved only by those who study the past and garner and enjoy and preserve what it has discovered and proceed to build upon it. There is no alternative but to start over again from the ape in every generation. Santayana has said words to the effect that those who do not study and are not willing to be guided by the past are destined to repeat the errors of the past; and Viscount Bryce said that everything that has power to win obedience and reverence must have its roots deep in the past.

1. The problem before us had its beginning when, as a war measure in the War Between the States, President Lincoln issued a proclamation freeing the Negro from slavery in which he had been bound. The bewildered Negro, save for the few years he has spent with the Southern white man, had no education or training except such as had come to him as a tribesman in the jungles of Africa. Under the leadership of white men of good intentions from the North, ignorant of conditions prevailing in the South, there began upon the death of President Lincoln a period which all Americans recall with sadness and shame, which Claude G. Bowers has so vividly described in his book "The Tragic Era."

Many of those at the forefront of that crusade were idealists, and even clergymen who did not

have a clear idea of the difference between "the things which be Caesar's," and "the things which be God's." (The same want of understanding has persisted in those groups until today.) Selfish politicians and conscienceless adventurers exploited the Negro and drove him to misdeeds of which under other circumstances he would not have been guilty. Finally, a saner viewpoint came upon the leaders in the North and, under the spur of sensible decisions by the courts, the Negro and the white man of the South were left, for a time and for the most part, to work out their destiny along lines of their own choosing. The courts particularly¹⁸ assumed and performed their traditional role as the balance wheel, and tempered, or arrested altogether, the extreme actions under which the "carpetbaggers" were engaged in an effort, in defiance of the Constitution, to set the Negro up as ruler over the Southern white man.¹⁹

The areas where the white man and the Negro were left in near equal numbers have, from that day to this, labored under a problem of such magnitude and complexity that nobody who has not lived in intimate daily contact with it has

18. See, e.g., *Slaughter-House Cases*, 1874, 16 Wall (83 U.S.) 36; *United States v. Reese*, 1875, 92 U.S. 214; *United States v. Cruikshank*, 1875, 92 U.S. 542; *Ex parte Virginia*, 1880, 100 U.S. 339; *United States v. Harris*, 1882, 106 U.S. 629; *Civil Rights Cases*, 1883, 109 U.S. 3.

19. This action is brought under 42 U.S.C.A. §§ 1981 and 1983, two of the group of Civil Rights Acts concerning which the Supreme Court said, in *Collins v. Hardyman*, 1950, 341 U.S. 651, 656 (Cf. dissenting opinion in *Sharp v. Lucky*, 1958, 252 F.2d 913, 919):

"The Act was among the last of the reconstruction legislation to be based on the 'conquered providence' theory which prevailed in Congress for a period following the Civil War."

As demonstrated in the mentioned dissenting opinion, 252 F.2d pp. 916 et seq., statutes of this nature can be squared with the Constitution only when given a close and narrow construction. The quotations set forth at the pages mentioned apply with equal force here, including the words of Mr. Justice Jackson appearing in the Godkin Lecture he was preparing for delivery to the Harvard Graduate School of Public Administration at the time of his death (252 F.2d 910-911).

From *Collins v. Hardyman*, 341 U.S. 651 at 657, was reproduced in said dissent this language: "The Act . . . was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction."

The same words of caution apply, in my opinion, to the matter with which we are here dealing, and the same high statesmanship is called for in solving the problem before us.

ever been able to understand it. Its existence and compelling proportions have never been doubted by any who have taken the trouble to seek the truth or to cast their eyes about the world and what is going on in it today.

As different in ambition, in tastes, in aptitudes, in standards of behavior, and in culture as the pigments of their skins, they were left to compete for the products of a soil left barren and wasted by the red hoof of war. The advance made by the Negro in the face of these untoward circumstances transcends any ever achieved by any race under comparable circumstances in the annals of man. This has been possible because of the recognition by both of the essential differences between the two races, a patient and tolerant attitude towards those differences, and a determination to live and work side by side in the best manner the circumstances would permit.

No man has had a better understanding of the problem or a more honest attitude in speaking of it than William Alexander Percy. In the chapter entitled "Fode" of his book "Lanterns on the Levee," page 286, appears this paragraph, which sums up in a whimsical sort of way a good deal of the problem which necessarily exists where two races of so many profound differences are forced by circumstance to occupy the same geographical area:

"The righteous are usually in a dither over the deplorable state of race relations in the South. I, on the other hand, am usually in a condition of amazed exultation over the excellent state of race relations in the South. It is incredible that two races, centuries apart in emotional and mental discipline, alien in physical characteristics, doomed by war and the Constitution to a single, not a dual, way of life, and to an impractical and unpracticed theory of equality which deludes and embitters, heckled and misguided by pious fools from the North and impious fools from the South—it is incredible, I insist, that two such dissimilar races should live side by side with so little friction, in such comparative peace and amity. This result is due solely to good manners. The Southern Negro has the most beautiful manners in the world, and the Southern white, learning from him, I suspect is a close second."

2. A brief resumé of some of the decisions of the courts in respect to the Fourteenth Amendment

and the relationship between the races during the last three decades of the nineteenth century and the first five of the twentieth is necessary to an understanding of the many-sided problem presented by the case before us and the attitudes of the people involved which, in the end, will play the major part in its solution.

3. Thomas Jefferson wrote in the Declaration of Independence these words which have always been accepted as basic under the American System: "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . ." During its entire life it has been conceded that the Real Governor of the American People is public opinion.

For all practical purposes, the "Governed" are the people of the Deep South who live in areas where the two races approach equality in numbers. Of transcendent importance, therefore, is their attitude with respect to the socio-political problem which is before us.

VI.

The attitude of the "Governed" towards problems such as that before us rests at bottom upon the firm assurance they received from the courts of the land over a period of eight decades before *Brown* sprang Pallas-like full-fledged from the Jovian forehead of the Supreme Court.

As far back as 1878²⁰ Judge William B. Woods, appointed two years later as a Justice of the Supreme Court of the United States, had written for the United States Circuit Court for Louisiana: "The state, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which in its judgment will best promote the interest of all . . . Any classification which preserves substantially equal school advantages does not impair any rights and is not prohibited by the Constitution of the United States. Equality of rights does not necessarily imply identity of rights." In 1882, the United States Circuit Court for the Southern District of Ohio²¹ upheld the separate but equal doctrine. In 1896 came *Plessy v. Ferguson*, 163 U.S. 537, in which only Mr. Justice Harlan dissented. The case involved separate facilities in transportation. It is the case whose principles, as applied to education, were

20. *Bertonneau v. Board of Directors of City Schools et al.*, 3 Woods 177 (3 Fed. Cases 294, Case No. 1361).

21. *United States v. Buntin*, 10 Fed. 730.

repudiated by the Supreme Court in *Brown v. Board of Education* *infra*. There it was said (page 551):

"We consider the underlying policy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. *If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.* As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N.Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. . . ." [Emphasis supplied.]

Three years after *Plessy*, Mr. Justice Harlan indicated ostensibly that he did not think that what he had said dissenting therein was applicable to a suit involving public schools. He affirmed the action of the Supreme Court of Georgia in holding that the failure to provide a high school for Negroes did not justify the holding under the Fourteenth Amendment that money raised by general taxation could not be used to maintain a high school for white students only.²²

In 1927, the Supreme Court held in *Gong Lum et al v. Rice*, *et al*, 275 U.S. 78, that a child of Chinese blood born in and a citizen of the United States is not denied the equal protection of the laws under the Fourteenth Amendment by being forced to go to a colored school rather

than a white school. A state circuit court of Mississippi had granted mandamus against the Mississippi school authorities "commanding them and each of them to desist from discriminating against her on account of her race or ancestry and to give her the same rights and privileges that other educable children between the ages of five and twenty-one are granted in the Rose-dale Consolidated High School." The Supreme Court of Mississippi reversed the case²³ on the ground that a school for colored children was maintained in the county of the young lady's residence and that, being a Mongolian, she was classified as colored. The basis of this decision was that, although the young lady had, solely because of her race, been denied the right to attend a school for white children, this action did not violate her rights under the Fourteenth Amendment.

This quotation from that opinion (275 U.S. pp. 85-87) demonstrates that its holding is susceptible of no other construction:

"The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. In *Cumming v. Richmond County Board of Education*, 175 U.S. 528, 545, *persons of color* sued the Board of Education to enjoin it from maintaining a high school for white children without providing a similar school for colored children which had existed and had been discontinued. Mr. Justice Taft, in delivering the opinion of the Court, said:

"Under the circumstances disclosed, we can not say that this action of the state court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination *against any class on account of their race*, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools can not be justified except in the case of a clear and unmistak-

22. *Cumming v. Richmond County Board of Education*, 1899, 175 U.S. 528. Extensive quotation from the case appears *infra*.

23. *Rice v. Gong Lum*, 139 Miss. 760.

able disregard of rights secured by the supreme law of the land."

"The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is *classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black*. Were this a new question, it would call for very full argument and consideration, but we think that *it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution*. *Roberts v. City of Boston*, 5 Cush. (Mass.) 198, 206, 208, 209; *State ex rel Barnes v. McCann*, 21 Oh. St. 198, 210; *People ex rel King v. Gallagher*, 93 N.Y. 438; *People ex rel Cisco v. School Board*, 161 N.Y. 598; *Ward v. Flood*, 48 Cal. 36; *Wysinger v. Crookshank*, 82 Cal. 588, 590; *Reynolds v. Board of Education*, 66 Kans. 674; *McMillan v. School Committee*, 107 N.C. 609; *Cory v. Carter*, 48 Ind. 327; *Lehew v. Brummell*, 103 Mo. 546; *Dameron v. Bayless*, 14 Ariz. 180, *State ex rel Stout-Meyer v. Duffy*, 7 Nev. 342, 348, 355; *Bertonneau v. Board*, 3 Woods 177, s.c. 3 Fed Cases, 294, Case No. 1,361; *United States v. Buntin*, 10 Fed. 730, 735; *Wong Him v. Callahan*, 119 Fed. 381.²⁴

"In *Plessy v. Ferguson*, 163 U.S. 537, 544, 545, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, this Court, speaking of permitted race separation, said:

"The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

"The case of *Roberts v. City of Boston*, supra, in which Chief Justice Shaw of the Supreme Judicial Court of Massachusetts announced the opinion of that court unhold-

ing the separation of colored and white schools under a state constitutional injunction of equal protection, the same as the Fourteenth Amendment, was then referred to, and this Court continued:

"Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by legislatures of many of the States, and have been generally, if not uniformly, sustained by the Courts,' citing many of the cases above named.

"Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is

Affirmed."

(Emphasis supplied.)

It appears to me, and I think to the vast majority of the lawyers of this country, that the decision of the Supreme Court in *Brown v. Board of Education*, 1954, 347 U.S. 483, is a direct rejection and overruling of *Gong Lum v. Rice* and the cases upon which that decision was based.²⁵

It was not necessary, therefore, to "turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written," but only to 1927 when the Supreme Court laid down the principles of *Gong Lum* as "the law of the land." It is nowhere intimated that "psychological knowledge" was not as extensive and accurate in 1927 as it was in 1954. The "governed" are of the belief, therefore, that the Supreme Court, based upon assumed psychological knowledge alone, changed the "law of the land" and repudiated principles which had formed the basis of action upon which the citizenship of a considerable portion of this nation had built up a happy and productive civilization under handicaps as great as ever faced any people; and that the

24. Cf. also *Berea College v. Kentucky*, 211 U.S. 45, and *Dellison v. Lee*, 83 Ky. 49.

25. See the long list of articles by distinguished lawyers and judges discussed infra.

Supreme Court was without just power, under the American System, so to do.²⁶

VII.

A brief look at the years intervening between *Gong Lum* and *Brown* will disclose an interesting background for the violent change of front. The former was rendered during the period of transition following World War I. President Woodrow Wilson had been accustomed to say to intimates, as well as in public, that the greatest worry brought to him by the presidency was whether he would have the character and determination to give back to the States and to the people, voluntarily and ungrudgingly, the powers belonging to them which had been yielded to serve the grim necessities of war. Since the beginning of time, peoples have had a tendency to go voluntarily into dictatorships to fight a war. Fate decreed that Mr. Wilson should not have the opportunity to see that these powers were returned to the States and to the people.

Everyone knows that quite the contrary took place. The bureaus and administrative agencies, fashioned to carry out these powers set a practice which has furnished a pattern which subsequent bureaus have avariciously followed. The first thing each did was to establish a department of publicity and propaganda which, without any attempt at modesty, would set about to charm the people into believing that the retention of these centralized powers by the federal government and their rapid expansion were indispensable to the welfare of the country and the states. The printed page and the air waves have been kept filled with these slanted claims from that day to this.

Soon after *Gong Lum* began the Great Depression; followed World War II and the Korean "Police Action." Then ensued the Cold War in whose grip the nation still remains. All of these eras of crisis have tended inevitably towards centralization of power in the Federal Government and a consequent robbing of the States of the rights retained by them in the Constitution.

This period of centralization and the climate

which attended it spawned a group of minorities whose adherents and whose influence from the start has grown by leaps and bounds. The slogan of "Tax, Spend, Elect" brought smiles as well as power to the politicians. Equally powerful was the voice of the minorities, which under the benign aegis of those in political control rapidly grew sleek and fat and powerful so they have unblushingly boasted that no national election can be carried without their support. That the boast is not an idle one is readily revealed in contemplation of their closely knit organization and their possession of such funds that they can spend more money in a national election than all the political parties combined. Statisticians can demonstrate that most of the national elections since 1936 have been carried by top-heavy majorities in less than a dozen big cities where these minorities have flourished and applied their greatest pressures.

One of the accepted phenomena of the period has been the solid bloc voting by Negroes in these cities. Raymond Moley's commentary²⁷ refers to the power of this vote and some of the dangerous features inherent in it.²⁸

27. Human Events, Dec. 1, 1960, Vol. XVII, No. 48-Sec. V.

28. "... It might be a good year for enlightened Americans to call attention to the sordid practices of politicians of both parties who regard the Negro as a political pawn. No one should demand this with more fervor than Negro leaders who are not presently in politics.

"It is already time that Negroes who have made such great progress in education and economic status should demand that they be treated in the appeals of politicians as citizens of the United States who have concerns other than those which affect them solely as members of a race. We are all equally concerned over foreign affairs, the stability of our income, and with cultural progress of all kinds.

"In every great city it has been revolting to see political leaders of both parties bid for a solid Negro vote. In New York four governors in the past 20 years—Lehman, Dewey, Harriman and Rockefeller—have treated the Harlem votes as special cases. . . .

"In the campaign now completed, the appeal to the Negro as a member of a race and not as an American citizen was especially pronounced. His vote was regarded as 'pivotal.' In the magazine *Jet* there was a calculation of how the election could be decided by special appeals to the very considerable Negro minorities. The numbers cited by *Jet* were: New York 775,000; Illinois 510,000; Pennsylvania, 460,000; California, 450,000; Ohio 400,000; Michigan, 350,000. It is unfortunate for the Negro himself that these large blocs of votes should be regarded as the balance of power. For nothing so intensifies prejudice as the assumption that members of any minority vote as a bloc.

"I once heard the distinguished Rabbi Wise say in his pulpit that the moment there was a 'Jewish

26. *Gong Lum* was written by Chief Justice Taft, one of the great statesmen and judges of our history. With him were Associate Justices Oliver Wendell Holmes, Louis D. Brandeis and Harlan Fiske Stone, who rank among the greatest liberals ever to occupy positions on our highest court. Justice Holmes had been a Union soldier in the War Between the States. The decision was unanimous.

This powerful minority has demonstrated its effectiveness in obtaining favorable treatment by all departments and segments of government. It has, moreover, so propagandized and pressured the Negroes of the South that their true leaders have found it extremely difficult to make themselves heard above the strident voices which flood it from other sections of the nation.

There is a tendency, joined in by a few politicians in the South, to criticize what is classified as a practice of the South to set itself apart from the nation because of its own peculiar problem. The fact is that the South is given no alternative. Hardly a political campaign begins in certain sections of the nation on any other note than one designed to capture the Negro vote by making the South the whipping-boy of their campaigns for election. In no other segment of American life is there so constant a campaign to gain votes in their own sections by essaying to act as savior for the Negroes in the South in whom they could have nothing more than a nominal interest.

VIII.

In spite of the propaganda and the resultant indoctrination of people generally with the ideas emanating from Washington and from the minority groups, the Supreme Court for a while proceeded to observe precedent and to strike down some of the legislation which it felt to be the product of an over-zealous president and Congress.²⁹

This trend under which the Supreme Court was holding a brake on the actions of the Congress and the Executive soon came, however, to a rather abrupt end. Shortly after President

vote, there would be an anti-Jewish vote. The concept of classes, whether they be based upon race, religion, or economic status, is repugnant to the whole spirit of America. To consider them as such is to usher in what might be called 'political tribalization.'

'Ultimately, such reliance upon class voting will destroy the reality of a two-party system. For each party will be divided into classes and factions.'

"Never was a national unity, with a broad national spread of both parties into small groups, needed as much as now. It is time to end the concept of any group as a political pawn."

29. E.g., *Panama Refining Co. v. Ryan*, 1935, 293 U.S. 388, dealing with the petroleum industry under the National Industrial Recovery Act; *Railroad Retirement Board v. Alton Railroad Co.*, 1935, 295 U.S. 330, voiding the Railroad Retirement Act; and *Louisville Joint Stock Land Bank v. Radford*, 1935, 298 U.S. 555; *Humphreys, Executor v. United States*, 1935, 295 U.S. 602; and *Schechter Poultry Corp. v. United States*, 1935, 295 U.S. 495.

Roosevelt had been reelected by an almost unanimous vote of the Electoral College, he sent to Congress February 5, 1937, his Reorganization Plan for the Supreme Court, commonly referred to as the "Court Packing Plan." There was promptly introduced in the Senate a bill known as S-1392 of the Seventy-fifth Congress, which was the source of earnest and extended debate from that time until it was recommitted to the Senate Judiciary Committee July 22, 1937. The President had asked the right to appoint an additional number of Supreme Court Judges with the frank admission that his purpose was to place upon the Court a sufficient number of judges whose minds were slanted towards the objectives he was seeking so that they might out-vote the members of the Court who were of another school of thought and who were instrumental in declaring unconstitutional some of the congressional action he had recommended.

The Supreme Court Packing Bill was followed shortly by a reversal of attitude on the part of the Supreme Court. One of the first principles to fall related to freedom of contract, which the Court had diligently guarded,³⁰ but which was set aside upon the change of the vote of one judge by the five to four decision in *West Coast Hotel Co. v. Parrish*, 1937, 300 U.S. 379.

The Court had³¹ voided the Bituminous Coal Conservation Act of 1935 on the ground that it was an attempted regulation of the production of coal on the theory that this was a regulation of interstate commerce. But that holding was soon cast into the limbo.³²

The drastic change in the approach to constitutional questions is intelligently discussed in an article by Thomas Raeburn White of the Pennsylvania Bar.³³ The cases by which the change was effected are collected in that publication, and no good purpose will be served by listing them here. These words quoted from the article merit serious consideration: "Undoubtedly the cries of the distressed, the rumblings of discontent, the demands of the agitator and the politician penetrate, like the sound of many waters, even into the quiet of the judicial cham-

30. *Atkins v. Childrens Hospital*, 1923, 261 U.S. 525.

31. *Carter v. Carter Coal Co.*, 1936, 298 U.S. 238.

32. *Sunshine etc. Coal Co. v. Atkins*, 1940, 310 U.S. 381.

33. "Construing the Constitution: The New 'Sociological' Approach," *American Bar Association Journal*, December, 1957, Vol. 43, No. 12, pp. 1085 et seq.

ber, and it cannot be doubted affect the minds of the judges. . . .

"President Roosevelt even went so far as to claim that what he called 'The Supreme Court Fight' caused the Court to change its decisions. . . .

"In COLLIERS for September, 1941, appears an article entitled 'The Fight Goes On' in which he wrote concerning the changed attitude of the Court: 'The court yielded. The court changed. The court began to interpret the Constitution instead of torturing it. It was still the same court with the same justices. No new appointments had been made. And yet beginning shortly after the message of February 5, 1937 (proposing the court packing plan). What a change . . . it would be a little naive to refuse to recognize some connection between these decisions (overturning earlier decisions) and the Supreme Court fight.'³⁴

"The serious question which confronts us now is whether constitutional government has broken down. *Whether the American theory that tried and true principles of government may be enshrined in a written constitution and entrusted to the courts for their protection, has proved to be illusory.* . . .

"If it be admitted that the Court may change the Constitution by construction whenever it sees a need therefor, constitutional government as we have known it and as it was visualized by its founders has indeed ceased to exist.³⁵

"The reputation of the Supreme Court has suffered certainly in the opinion of the legal profession and probably more generally by reason of its instability as shown by the frequent overruling of its own recent decisions, caused largely by changes of opinion of individual judges, its disregard of precedents which were believed to have settled the law, and most of all by a method of construing the Constitution to attain a desired object, although in effect the Constitution is amended and the balance of power between the Federal Government and the states seriously disturbed."³⁶ [Emphasis added.]

The ideas thus expressed are carried forward in a dissertation by H. Gifford Irion.³⁷ The au-

thor deals with the decision of the Supreme Court in *Brown v. Board of Education*³⁸ and, near the beginning, states in a note:³⁹

"There has been a somewhat curious position taken by editors and others who oppose segregation. In effect, they have said 'the court has spoken and therefore all debate is at an end.' One needs only to observe that if this dogmatic acceptance of a Supreme Court decision had always been part of our legal history, we should still be living with unregulated child labor and many other things now considered archaic. Had the Republican Party been pledged to such an attitude, the Dred Scott decision would have remained 'the law of the land' and the abolition of slavery would have had to await the slow enlightenment of individual states. Actually, a Court pronouncement may be only the beginning of an argument." Proceeding, the author says:

"The significance of the decision . . . extends far beyond its actual effect upon the matter of segregation to its potential influence upon future interpretations of the Constitution. This element—so grossly underplayed—arises from the fact that the Court, in reaching this decision, employed a new method of judicial determination, a method which must be studied and debated with intense seriousness.

"'[W]e cannot turn the clock back,' said the Chief Justice. It was a ringing phrase; one which caught up the imaginative fire of all those who profess that tradition is a bondage from which mankind must escape. . . ."⁴⁰

"Clearly, the critical point in this reasoning was reached when the Court found that segregation had an adverse effect upon Negro children. Without this, the conclusion could not possibly have proceeded with any pretense at logic. Consequently, it is of the utmost importance to ascertain the technique by which so far-reaching a constitutional change was made. The intangible factors relied upon by the Court were the presumed feeling of inferiority by those who were educated separately and the detrimental effect segregation had upon their educational and mental development. The evidence of these intangibles consisted of one quotation from the Kansas court which had ruled against the Negro plaintiffs below, and a footnote listing a number of works on psychology and sociology. With one fell swoop the Court then jettisoned the sepa-

34. *Ib.* p. 1152, including Note 54.

35. *Ib.* p. 1154.

36. *Ib.* p. 1155.

37. LL.B. George Washington University, Member of the District of Columbia and Commonwealth of Virginia Bars, *The Georgetown Law Journal*, Vol. 46, No. 3, Spring 1958, p. 443 et seq. entitled "The Constitutional Clock: A Horological Inquiry."

38. 347 U.S. at 494.

39. *The Georgetown Law Journal*, supra, at page 443.

40. *Ib.* 443.

rate but equal doctrine. It declared that separate facilities are inherently unequal... [Rejecting the decision in *Plessy v. Ferguson*, supra, insofar as it applied to education.]

"It is impossible to read this portion of the opinion without concluding that a constitutional doctrine which had endured for fifty years was cast into limbo on the authority of sociological writings which were accepted as beyond dispute. Regardless of the validity of these writings the genuinely serious issue is whether it is proper to rely upon such sources in resolving constitutional questions....

"...The winding road between *Adkins v. Children's Hospital* and *West Coast Hotel Co. v. Parrish* [supra]... reveals the temptation offered under the fourteenth amendment for the shaping of decisions by personal philosophy.... throughout the history of these decisions certain landmarks were established and, equally important, certain judicial methods of interpretation were followed, however erroneously in individual cases.... This has been done, however, with the utmost caution and after a careful examination of all the arguments. Needless to say, such reversals have been expressed with the most faithful regard for the established canons of constitutional interpretation (Citing *Pollock v. Farmers' Loan and Trust Co.*, 1895, 157 U.S. 429, and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379.)⁴¹

"We have seen in the *Brown* case that the Court rejected in a rather summary fashion the purpose and intent of the framers of the fourteenth amendment by saying that the historical data were inconclusive. Mr. Alexander M. Bickel (79 Harv. L. Rev. 1, 1955), who is now an assistant professor at Yale, has performed a splendid piece of scholarship in reviewing the debates on the fourteenth amendment in his article on the segregation decision. It was his considered judgment that the original understanding of the framers was 'anything but conclusive' and that integrated schooling was not one of the matters they had in mind among the civil rights they were insuring....⁴²

"The men who fashioned the fourteenth amendment represented varying shades of opinion including the extreme egalitarianism of the Radicals. The Radicals capitulated, however, in their demands in order to get support from the Moderates. In no other way could the amend-

ment have been put through. It seems ironic that we should deliberately interpret the instrument in a manner which the majority of our ancestors did not wish and which, had they foreseen the future, would probably have caused them to act otherwise.

"There is, however, a greater cause for concern about the rationale of the Court in the Segregation Cases. As noted before, the crux of the decision lies in its reliance upon contemporary sociology. It can scarcely be disputed that such studies as sociology and psychology are not 'exact sciences' within any reasonable meaning of that term. Schools of opinion blossom and fade. Each apostle tends to attract a group of followers and these, in turn, tend to follow individualistic lines which often result in the establishment of new schools.... Few would dispute the fact that some areas of the South have distinct sociological problems of their own with respect to integration. There is no logical reason why these should not be pleaded to show that the clock has not moved as fast—or in the same direction—as in other areas. If it is true, as the Court has suggested, that our national social development has reached a point where new visions are opened under the Constitution, it must also be conceded that this, at best, represents an average or median. It is just as reasonable to say that where such social conditions are radically different, new constitutional insights do not apply.

"The trouble with this *modus operandi* is that it not only leaves much to conjecture, but also that it could be applied to substantiate theories contrary to our concept of democracy. The Third Reich affords an extreme and tragic example of this. All of us remember how Hitler was always able to commandeer social scientists to support the Nazi theses. Can we be certain that something at least approximately similar could never happen here? There is at least a suggestion in history that scientific theories, especially in those areas of human relations where no yardstick has been devised to aid the struggling scientist, are subject to rapid and unpredictable fluctuations. Under such conditions the conscientious social scientist may invite our sympathy but does he command our blessings as an arbiter of constitutional doctrine?⁴³

"...But this is quite a different thing from making the Constitution into a kind of automatic

41. *Ib.* 446.

42. *Ib.* 447.

43. *Ib.* pp. 448-449.

timepiece which goes off whenever the heralds of a new era have spoken. In resolving these questions the nature and basic mechanism of the constitutional clock should be fully considered. . .

"... But the classical exponents of neither school [that is, the strict school and the liberal school] would concede that the Constitution was to be read in terms outside its 'explicit' or 'implicit' provisions. . . . The approach in the Segregation Cases seems novel in that it appears to repudiate that rule in order to accept current—and possibly transitory—sociological findings. . . ."⁴⁴

"... The turning point of the decision [*Brown*], it would seem, was when the Court found that as a result of segregation Negro children suffered from a sense of humiliation. Whether this evil would be remedied by thrusting them into a school with white children is open to serious question. There can be very little doubt that young people are peculiarly gifted at devising means for ostracizing those whom they regard as undesirable. No judicial process is required nor is it necessary to resort to anything so uncouth as violence. Yet the undesired individual can still be cast into outer darkness with complete effectiveness. If tactics such as these are used, shall we nevertheless assume that the federal government has a role to perform in protecting its citizens from humiliation? . . ."⁴⁵

"The last, and most important, matter relates to the very nature of the judiciary. Chief Justice Marshall said [*Osborn v. Bank of United States*, 22 U.S. 738, 866 (1824)]: 'Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instrument of the law, and can will nothing.' For generations the proposition has been accepted that courts decide only the questions before them in a contested case and, though lasting principles necessarily emerge from such decisions they do not come by virtue of any power within the judicial process to formulate policy. . . . No one [speaking of Mr. Justice Holmes] has ever been more loyal to the concept of limitation on judicial power than he. It was the very essence of his philosophy, repeated time after time, that judges should not superimpose their personal economic and other opinions on legislation. [*Lockner v. New York*, 198 U.S. 45 (1905)]."⁴⁶

44. *Ib.* 450-451.

45. *Ib.* 455.

46. *Ib.* 456-457.

A good statement against the right of the Supreme Court to substitute its notions at the time being of what constitutes natural justice for the limitations imposed by the Constitution is found in the dissenting opinion of Mr. Justice Black (including the appendix) in *Adamson v. California*, 1947, 332 U.S. 46, 90 et seq.:

"Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course. . . .

"... But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

"An early and prescient exposé of the inconsistency of the natural law formula with our constitutional form of government appears in the concurring opinion of Mr. Justice Iredell in *Calder v. Bull*, 3 Dall. 386, 398, 399: 'If any act of Congress, or of the Legislature of a state, violates . . . constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.'"⁴⁷

"... to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is

47. See Note 18, page 91.

another [thing]. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' *Federal Power Commission v. Pipeline Co.*, 315 U.S. 575, 599, 601, n. 4.

"Mr. Justice Douglas joins in this opinion."

This general subject is dealt with in another article appearing in the American Bar Association Journal:⁴⁸

"The Court [in the Segregation Cases] does not say in so many words that it adheres to the dogmas of 'natural law', but these school cases are not the first in which natural law considerations have played a decisive part. They give comfort to those who believe that the eternal verities should take precedence over the written law, and they are disturbing to those who prefer a written constitution. Progressive modification by the judges of the judge-made common law is a very different thing from abruptly changing a written constitution. If the eternal verities as revealed through the writings of Gunnar Myrdal are to outweigh the words written in the constitution, the concept of the constitution as a solemn and binding contract is destroyed....

"... Since we must rest our decision on the Constitution alone, we must set aside predilections on social policy and adhere to the settled rules which restrict the exercise of our power to judicial review—remembering that the only restraint upon this power is our own sense of self-restraint."⁴⁹

"The alarming significance of the school cases extends beyond the immediate decisions. Never before have the personal predilections and moral certainties of the Justices ridden so rough-shod over the text of the written Constitution. The Court has

found that the moral law which impels it to advance the interests of colored people outweighs the moral law which teaches that a judge who has sworn to uphold a constitution ought to uphold it."

The author then illustrates his point by supposing that two baseball teams were tied in the last inning of the World Series and the umpire is morally convinced that the Yankees ought to win. The Yankee runner is tagged with the ball forty-five feet from the home plate, and the umpire, acting on his understanding of the precepts of natural law, rules that the runner is safe at home. Those who bet on the Dodgers are then confronted with the problem of whether the moral law requires them to pay their bets. He closes with this question, which he answers himself:

"Does the decision of the umpire prevail over the rules of the game? One of the rules of the game is that both teams shall obey the decision of the umpire; and the umpire has promised to stick to the rule book."

It is not surprising to find the great Learned Hand questioning the wisdom of *Brown* and the power of the Court to render it.⁵⁰ Apparently finding himself unable to understand the source of power claimed by the Supreme Court in the rendition of this decision, he states (page 73): "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I would miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs...."⁵¹

50. Cf. "The Bill of Rights," Library of Congress Catalog Card No. 58-8248. See particularly Chapter III, "The Guardians," and pages 54, 68-73.

51. And see also "The School Segregation Cases: Opposing The Opinion Of The Supreme Court," By Eugene Cook and William I. Potter, Volume 42 American Bar Association Journal, page 313; "The Segregation Cases: A Deliberate And Dangerous Exercise Of Power," by Sims Crowmover, ib. 727; "Judicial Self-Restraint: The Obligation Of The Judiciary," by Ralph T. Catterall, ib. 829; "A Warning: Was It Justified?" by S. Bruce Jones, Vol. 43 ib., page 55; "Enforcement Of Federal Court Decrees: A 'Recurrence To Fundamental Principles'," by Alfred J. Schweppe, Vol. 44 ib. 113; "Construing The Constitution: A Trial Lawyer's Plea for Stare Decisis," by Wendell J. Brown, ib. page 42; "The School Segregation Cases: A Legal Error That Should Be Corrected," by Charles J. Bloch, Vol. 45 ib., page 27; "The Doctrine Of

48. By Ralph T. Catterall of the State Corporation Commission of Virginia, Vol. 42, No. 9, September, 1956, pp. 829, et seq., 832-833.

49. The quotation is from the dissent of Chief Justice Vinson (who had written the opinion of the Court in *Shelly v. Kraemer*, 334 U.S. 1) in *Barrows v. Jackson*, 1953, 346 U.S. 249, 269.

IX.

1. The "governed" are not able to put out of their minds that the judicial revolution of which the segregation decisions were a part was wrought under the conditions following the "court packing plan" and that within three years, the father of that plan had appointed a majority of the Supreme Court; and that eight of the nine Justices who rendered the *Brown* decision were appointed by President Roosevelt (five) or his vice president and political ally, President Truman (three) who had as Senator voted against killing the measure. Cong. Record 75th Congress, P. 9567. They are conscious of the fact also that not since the death of Chief Justice White in 1921 has any judge sat as a member of that Court who has had a sympathetic understanding of the South's problem.

2. It is the universal conviction of the people of the conquered provinces also that the judges who function in this circuit should render justice in individual cases against a background of, and as interpreters of, the ethos of the people whose servants they are. This is the genius of the judicial system established by Congress and as traditionally administered by those who select the judges—a process, incidentally, which all know follows normal political lines. The statutes creating the United States Courts of Appeal require that only citizens who are residents of the

respective circuits at the time shall be eligible for appointment, and that they shall continue to reside in the circuit during their term of office (28 U.S.C.A. §44(c)). For decades, in this circuit, judges have been selected so that each state in the circuit shall be fairly represented on the court.

It is the firm conviction of the "governed" also that decisions such as this one, in cases brought by or on behalf of Negroes and involving the equal protection clause of the Fourteenth Amendment, have not been in harmony with the spirit, thought and desires of the people, the vast majority of whom, in both races, know that their common problems can best be worked out if they are left alone to continue the unbroken improvement in relationships which has taken place in the last eight decades. They are keenly conscious of the fact that since the end of the tragic era following the War Between the States and in spite of the handicaps born of it, there has been a continuing growth in mutual understanding, respect and brotherhood between the members of the two races; and that the progress made by the Negroes in advancement educationally, socially, economically and in all other phases of their lives has exceeded that achieved anywhere else in any country at any time. That a breach in these relationships, achieved in the close and compassionate contacts which have taken place under such trying conditions should be permitted to occur is unthinkable to practically all of the people of good will of both races.

The rank and file of Negroes, realizing the hardship under which they labor by reason of the head-start of several centuries enjoyed by white people, and proud of their race and its accomplishments, resent the efforts of the agitators who do not understand, to confer a status upon them which is achieved and can be maintained only under force of the heavy hand of the law. They feel, in common with their white neighbors, that the judges should perform their duties with a sympathetic understanding of the true facts; and further that such an understanding has been tragically lacking in many of the decisions of many of the Judges in the Fifth Circuit whose actions have gone so far to the other extreme that Time Magazine gave six of the Judges an enthusiastic write-up with photographs in its issue of December 5, 1960, page 14. The article, encircled in red for emphasis, was headed "TRAIL-BLAZERS ON THE BENCH—

Stare Decisis: Misapplied To Constitutional Law," by Hamilton Long, Vol. 45 *Ib.*, page 921; "Georgia Constitution And Mixed Public Schools," by E. Cook, Ga. Bar J., 17:174-183; "Legal Standings Of The South's School Resistance Proposals," by F. B. Nicholson, S. C. L. Q., 7:1; "Segregation In Public Schools of Georgia," by R. H. Hall, Ga. Bar J., 16:417; "School Systems, Segregation And The Supreme Court," by H. E. Talmadge, Mercer L. Rev., 6:189; "Implications Of The Segregation Decision," by Jared Y. Sanders, Jr., La. Bar J., 4:93; "Schools, The Supreme Court And The States' Power To Direct The Removal of Gunpowder," by J. F. Johnston, Ala. Law., 17:3; "Segregation In Public Education—A Study In Constitutional Law," by C. O. Amonette, Ala. Law., 17:305; "White South Is A Minority Group: Supreme Court Cannot Bestow White Man's Inheritance On Another Race," by C. K. Brown, Ala. Law., 17:438; "Why Southerners Think As They Do," by M. Rushton, Ala. Law., 17:339; "Separate But Equal—Dead Or Alive?" Ga. Bar J. 19:541; "Desegregation Cases; Criticism Of The Social Scientist's Role," by K. B. Clark, Vill. L. Rev., 5:224; "Civil Rights—Or Civil Wrongs?" by C. J. Bloch, Ga. Bar J., 22:127; "The Law Of The Land," by C. J. Bloch (address before the Jacksonville Bar Association); "School Segregation Cases," by E. F. Leverett, Ga. Bar J., 23:9. And cf. the resolution of the Conference of Chief Justices meeting in Pasadena, Cal., Aug. 23, 1958.

South's U. S. Judges Lead a Civil Rights Offensive." It stated that the Judges extolled constituted "an honor roll without precedent in United States legal annals" and that they had "collectively . . . launched one of the great orderly offensives of legal history." Within a few days of this publication by the self-chosen cheerleader for the offensive group, court actions were taken in Louisiana and in Georgia which, the "governed" think, were as drastic and intemperate as any for which the Supreme Court has been so much criticised.⁵²

X.

The alacrity with which the United States Courts in both states struck down state statutes (in Georgia, by the action of one judge alone, cf. 28 U.S.C. §§ 2281-2284) rejected the regulations and actions of school officials, ordered state officials hither and yon on a few moments' notice, doubtless furnished the mentioned publication further support of its characterization of judges and judicial action as "offensive." Such proceedings might escape being referred to as tragic if we could ignore the sobering words uttered by people of the stature of Reverend Billy Graham, world famous evangelist, prophet, and seer.⁵³ In his article in U. S. News & World

52. E.g., some of the language used by the United States District Court for the Eastern District of Louisiana in *Bush et al. v. Orleans Parish School Board* and companion cases, 188 F. Supp. 916, 925-926, does not, in my opinion, accord to the Legislature of Louisiana the presumption of good faith or the dignity normally expected from one member of our dual sovereignty in its dealings with the other: "But this invocation of 'constitutional processes' is a patent subterfuge . . . Even assuming their good faith in proposing. . . ."

"The conclusion is clear that interposition is not a constitutional doctrine. If taken seriously it is illegal defiance of Constitutional authority. Otherwise, it amounted to no more than a protest, an escape valve through which legislators blew off steam to relieve their tensions." [Emphasis supplied.]

The same court, moreover, as if to make sure that there would be a direct clash between representatives of the two sovereignties, called upon the United States Department of Justice to take up the cudgels for a private litigant—already well represented.

53. It is common knowledge that Reverend Graham has such a firm conviction that social barriers should

Report of April 25, 1960, pp. 94 et seq., entitled "No Solution to Race Problem 'At The Point of Bayonets'":

"The Supreme Court can make all the decisions it feels are necessary; but, unless they are implemented by good will, love and understanding, great harm will be done.

"... At the same time I am convinced that some extreme Negro leaders are going too far and too fast. I am also alarmed by certain extreme elements in the press who fan the fires of racial prejudice. A Negro leader confessed to me, 'I have as much racial prejudice in my heart as any white man I've ever known.' A New York Negro leader told me three years ago, 'I hate all whites.' Racial prejudice is a two way street. It must be ended and Christian love must prevail.

"I am also concerned about some clergymen of both races that have made the 'race issue' their gospel. This is not the gospel!

"... Only the supernatural love of God through changed men can solve this burning question . . .

"... The issue in America has moral, social and political implications. Sometimes these questions are extremely complicated—and equally devout men see them somewhat differently. . . ."

Challenging words these! I am unable to follow the majority here, because I think it is applying force, blind and witless, in a situation where love alone can triumph.

If Caesar can accomplish anything in this situation, it must be keyed to the magnificent progress which has been made by men of good will of both races out of the love in their hearts.

If this progress and its manifest benefits are to be lost or even crippled by the intemperate and ill-considered actions of those who speak in behalf of government, then great is the sin of those of us who are entrusted for a brief moment with that responsibility.

be broken down by purifying men's hearts that he will not address an audience which is segregated by compulsion.

TRANSPORTATION

Stations and Waiting Rooms—Alabama

Carl L. BALDWIN, et al. v. J. W. MORGAN, et al.

United States District Court, Northern District of Alabama, Southern Division, November 23, 1959; April 21, 1961, Civil Action No. 8634, _____, F.Supp. _____.

United States Court of Appeals, Fifth Circuit, February 17, 1961, 287 F.2d 750.

SUMMARY: A Negro couple in Birmingham, Alabama, brought an action in federal district court against the commissioners of that city, the Alabama Public Service Commission, and the Birmingham Terminal Company. The suit was for a declaratory judgment as to plaintiffs' right to use certain waiting rooms in a railroad station in Birmingham, one designated for "Colored Intrastate Passengers" and another for "Interstate and White Intrastate Passengers." Plaintiffs alleged that they had been arrested by police officers while seated in the latter waiting room awaiting passage on an interstate trip, though they were later released without charge. The district court found that the complaint did not state a "case or controversy," and dismissed the action with leave to amend the complaint. 2 Race Rel. L. Rep. 420 (1957). On appeal, the Court of Appeals for the Fifth Circuit reversed and remanded, holding that the complaint was not, under the Federal Rules, subject to dismissal for asserted formal deficiencies. Since the Public Service Commissioners and the City of Birmingham Commissioners were charged with acting under color of state law, the court found the statement of a justiciable claim within the court's jurisdiction under the Civil Rights Act. 3 Race Rel. L. Rep. 318 (1958).

On remand, the district court held that the allegations of the complaint were not sustained by sufficient proof that "discriminatory compulsory segregation of Negro passengers in the terminal . . . is enforced by any one of the defendants." Again on appeal, the Court of Appeals for the Fifth Circuit reversed: "We think that a basic error in the District Court's action was the assumption that all that was involved was forcible segregation of the races and not other practices related to race and color which were equally impermissible under the Fourteenth Amendment and the Civil Rights Acts. . . ." Regarding the case against the Public Service Commission, which as an agency of the state had ordered the erection of the waiting room signs, the court declared: "Whether . . . the signs are merely intended by it as an invitation to each of the races . . . to permit voluntary acceptance of traditional social customs of the South is not significant. . . . It is simply beyond the constitutional competence of the State to command that any facility either shall be labeled as or reserved for the exclusive or preferred use of one rather than the other of the races." In regard to the Terminal Company, the court observed that when this public utility, in the exercise of its public function, "is the instrument by which state policy is . . . effectuated, activity which might otherwise be deemed private may become state action within the Fourteenth Amendment." It was therefore held that when the Terminal served as the instrument through which the signs were posted by state order, "the action is by the state." In relation to the City Board of Commissioners, the court held that travellers of both interstate and intrastate status have a right to be free from discrimination by police officers on the basis of race, and that it is a denial of equal protection for city policemen in the terminal to demand to see the tickets of Negroes seated in the "Interstate and White" waiting room, since similar treatment is not accorded white travellers.

Again on remand, the district court entered a general order holding the segregation orders of the Public Service Commission unconstitutional, and enjoining the Commission from requiring racial designation of waiting rooms or compelling segregated use of the facilities. The action of the Terminal company in posting and maintaining the segregated signs was declared unconstitutional and the company enjoined from continuing the policy. The custom or usage of the Board of Commissioners of the City of Birmingham in using race as the basis for determining the right of occupancy of the waiting rooms and in denying intrastate Negro passengers the right to occupy the interstate and white room was declared illegal, and further

such practice was enjoined. Reproduced below are the district court opinion on the hearing, the Court of Appeals action in reversing, and the district court order entered in pursuance of the Court of Appeals' mandate.

District Court Opinion Nov. 23, 1959

LYNNE, District Judge.

When this case was called for trial on October 27, 1959, plaintiffs filed a "motion requesting that the District Court refuse to hear the pending case unless a Three-Judge Court is empanelled" (sic).

Adverting to the notice, dated February 13, 1957, signed by Judge Grooms, referring to the present complaint, transmitted to the Honorable Joseph C. Hutcheson, Jr., Chief Judge, United States Court of Appeals for the Fifth Circuit, pursuant to the provisions of 28 U.S.C.A. 2284, and to Judge Hutcheson's letter in reply, dated February 19, 1957, declining to constitute a district court of three judges, this court denied such motion on the authority of *Gayle, et al v. Browder, et al*, 352 U.S. 903, affirming 142 F. Supp. 707; *Baldwin, et al v. Morgan, et al*, 251 F.2d 780; *Wichita Falls Junior College Dist. v. Battle*, 204 F.2d 632; *Board of Supervisors of La. St.U. & A.M. Col. v. Ludley*, 252 F.2d 372, and *Davis v. County School Board of Prince Edward Co., Va.*, 142 F.Supp. 616.

Thereupon, there ensued a trial to the court, without the intervention of a jury, which consumed parts of three days. After sifting and weighing the credible evidence, the court is left with the overwhelming conviction that the allegations of the complaint, held sufficient on appeal to withstand the attack of the motion to dismiss, *Baldwin, et al v. Morgan, et al*, 251 F.2d 780, were dissipated by the proof.

If the gaze of this court was once too foreshortened by contemplation of the regrettable arrests of these individual plaintiffs on December 22, 1956, which indubitably triggered this litigation, and in spite of the fact that there remains unresolved a nagging doubt as to their standing to complain or to represent a class who might complain of compulsory segregation of intrastate negro passengers, it accepts the mandate to find definitively as a matter of fact, not fancy, whether discriminatory compulsory segregation of negro passengers in the Terminal Station, Birmingham, Alabama, is enforced by any one of the defendants.

Answering in the negative, the court makes the following findings of fact:

1. No one of the defendants, under color of practice, custom, usage or state law is denying or threatening to deny negroes equal privileges and immunities by depriving them of their right to use the "Interstate and White Waiting Room" or any other waiting room at the Terminal Station, because of their race or color.

2. Defendants, City Commissioners (Birmingham, Alabama), are not pursuing a custom, statute or usage which denies plaintiffs and all other negroes similarly situated the right to use the waiting room at Terminal designated "Interstate and White Waiting Room." They have issued no orders during the year 1956, or subsequently thereto, pursuant to which plaintiffs and other negroes who use such waiting room are subject to arrest and confinement in jail.

3. Defendants, Public Service Commissioners (State of Alabama), have not issued, or caused to be issued, orders directing and requiring the segregation of negroes in the waiting rooms of Terminal.

4. During and since the year 1956, defendant, Terminal Company, has not pursued and is not pursuing a policy, custom or usage of denying plaintiffs and other negroes similarly situated the use of its waiting room designated "Interstate and White Passengers Waiting Room."

5. None of the defendants under color of Alabama custom, usage and law are in fact ignoring or defying the law by denying equal facilities because of race or color.

Turning to the provisions of Code of Alabama (1940), Title 48, Section 186¹ and of General Order No. T-21, Alabama Public Service

1. Title 48, Section 186, 1940 Code of Alabama: "Every railroad company in this State, on the order of the public Service Commission, shall provide, construct and maintain adequate depots and depot buildings for the accommodation of passengers, * * *. And said railroad * * * must have, when required by the public service commission, at each of the passengers station * * * sufficient sitting or waiting rooms to be determined by the commission, for passengers waiting for trains, having regard to sex and race * * *."

Commission,² of which plaintiffs complain, as applied by these defendants at the Terminal Station, this court concludes that they offend neither the Constitution nor statutes of the United States. While separate waiting rooms in such station are provided for white and colored

2. In re: Signs for Common Carrier Waiting Rooms, Docket 14072.

The Commission having under consideration the matter of rules and regulations governing carriers by railroad and by bus in the State of Alabama in the providing and maintenance of passenger stations or depots:—

IT IS ORDERED BY THE COMMISSION, That the general order set forth below be, and the same is hereby adopted and designed as the Commission's General Order No. T-21:

Wherever passenger stations or depots are maintained in Alabama by common carriers by rail or by motor vehicle there shall be placed by the carrier at or near the entrance of the waiting room designated for the Negro race an appropriate sign or signs indicating the location of the colored waiting room and such sign or signs shall contain this language: "Colored Waiting Room," and there shall be placed by the carrier at or near the entrance of the waiting room designated for the white race an appropriate sign or signs designating the location of the White Waiting Room, and such sign or signs shall contain this language "White Waiting Room," and the lettering on such sign or signs shall be of such size as to make the same clearly visible at a distance of at

passengers in obedience thereto, the custom and usage observed by these defendants is to remit to the voluntary choice of members of both races the use of either waiting room.

While no law, or custom or usage which is the equivalent of law, may compel the segregation of races in the area of public transportation, it is equally clear that people of good will of both races are free to observe traditions which for generations have been an intimate part of their way of life. A contrary view would be abhorrent to our notions of fundamental right and wrong.

A judgment will be entered denying plaintiffs and the class represented by them the relief for which they have prayed and dismissing this action.

This the 23rd day of November, 1959.

least 50 feet and such lettering shall be of a contrasting color so as to provide reasonable visibility.

IT IS FURTHER ORDERED BY THE COMMISSION, That this order shall be effective as of the date hereof and shall remain in effect until otherwise ordered by the Commission.

Dated at Montgomery, Alabama, on this the 8th day of February, 1956.

ALABAMA PUBLIC SERVICE COMMISSION

Opinion in U.S. Court of Appeals

Before RIVES, BROWN and WISDOM, Circuit Judges.

JOHN R. BROWN, Circuit Judge.

This case presents again the question of asserted unlawful segregation of races in the Railroad Terminal Station at Birmingham, Alabama. After a trial following our remand, *Baldwin v. Morgan*, 5 Cir., 1958, 251 F.2d 780, the District Court denied all relief sought by the Negro plaintiffs against the City Commissioners, the Alabama Public Service Commission, and the Birmingham Terminal Company, a private corporation.¹ The fact findings after a full trial come here with the insulation of F.R.Civ.P. 52(a), 28 U.S.C.A. While we reach a conclusion contrary to that of the District Court, we do so on the basis of the facts which are substantially without controversy. We do not credit any evidence either expressly or impliedly rejected by the District Judge.²

1. These will be referred to as the City, the Commission, and the Terminal.
2. This means that we reject altogether the testimony of the witness Michel even though we have some

We think that a basic error in the District Court's action was the assumption that all that was involved was forcible segregation of the races and not other practices related to race and color which were equally impermissible under the Fourteenth Amendment and the Civil Rights Acts, 42 U.S.C.A. § 1981, § 1983. As to each defendant this led the Court to focus on the issue of whether segregation was compulsory. Finding, as it did, that while separate facilities were to be and were furnished for the use of the races, neither the Commission, the

doubt that the District Judge's characterization "I find incredible the testimony of the witness Michel and I reject that testimony and its implications. * * * I don't believe she heard what she said she heard or saw what she said she saw. * * *" was meant to discredit more than those portions such as long distance lip reading, purporting to tie the Terminal into action by the City policemen. Likewise we disregard the incident concerning the removal and subsequent arrest and conviction of Dr. Juanita Pitts which the District Judge presumably attributed to her conduct and not her color.

City nor the Terminal coercively compelled occupancy of one to the exclusion of the other, the Court concluded that no case was made out. No doubt this was the main thrust of the plaintiff's complaint as the analysis of it in our prior opinion reflects. But this approach failed to take into account or properly evaluate in the light of federal constitutional requirements the virtually uncontradicted state action in which race was the significant factor. It also seems quite clear that despite *Browder v. Gayle*, D.C.M.D. Ala. 1956, 142 F.Supp. 707, affirmed 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, the defendants, if not the Court, labored under the misconception that race as an impermissible basis for distinction related to interstate commerce only and not to intrastate passengers.

The significant physical facts are simple and undisputed. The Terminal, a private corporation owned by specified railroads serving Birmingham, maintains a passenger station for arriving and departing passengers. This includes waiting rooms and the usual facilities for travelers as well as those of the public who are there awaiting the arrival or departure of passengers. There are two main but separate waiting rooms. Each is directly accessible through separate entrances on the track side of the depot and the street side. Over at least one entrance on the track concourse side, and again on the street side, signs were posted marking one as the Negro waiting room and the other for whites. As to one, the legend in large letters read:

"Colored Intrastate
Passengers
Waiting Room."

Over the other the sign read:

"Waiting Room
Interstate and White
Intrastate Passengers."

The Public Service Commission.

Whether, as suggested by the Terminal, the signs are merely intended by it as an invitation to each of the races to occupy these facilities separately provided in order to permit voluntary acceptance of traditional social customs of the South is not significant so far as the Commission is concerned. The Commission, an arm of the State of Alabama, pursuant to a specific statute is authorized to require separate waiting rooms.³

3. Alabama Code 1940, Title 48, § 186.

"Every railroad company in this state, on the

And it has done so by mandatory official regulation published as early as 1923.⁴ Moreover, because of intervening decisions forbidding racial discrimination as to facilities employed in interstate commerce⁵ the Commission in 1956 made the requirement even more emphatic. Of dominant significance for our purposes, the Commission's new Order T-21 required, for the first time, the posting of signs—in lettering of "contrasting color" clearly visible for at least fifty feet—to mark the separate rooms maintained for each of the races.⁶ The Commission both in its con-

order of the public service commission, shall provide . . . and maintain . . . depot buildings for the accommodation of passengers And said railroad company . . . must have, when required by the public service commission, . . . sufficient sitting or waiting rooms, to be determined by the commission, for passengers waiting for trains, having regard to sex and race"

4. Alabama Public Service Commission General Order No. T-2 (1923).

"All common carriers by rail shall provide and maintain at each of their passenger depots . . . for the comfort and accommodation of passengers waiting for or departing from trains, separate sitting or waiting rooms for the white and negro races There shall also be maintained . . . toilet facilities, . . . separately for males and females of the white and negro races"

5. The precipitant was the decision of the Interstate Commerce Commission in *NAACP v. St. Louis-San Francisco Ry. Co.*, 297 I.C.C. 335 decided November 7, 1955. It was hardly unexpected in view of *Mitchell v. United States*, 1941, 313 U.S. 80, 61 S.Ct. 873, 85 L.Ed. 1201; *Henderson v. United States*, 1950, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302; and see *Morgan v. Commonwealth of Virginia*, 1946, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, resting upon Article 1, Section 8 of the Constitution; *Boynton v. Commonwealth of Virginia*, 81 S.Ct. 182, 5 L.Ed.2d 206.

6. "In re: Signs for Common Carrier Waiting Rooms—Docket 14072.

"The Commission having under consideration the matters of rules and regulations governing carriers by railroad and by bus in the State of Alabama in the providing and maintenance of passenger stations or depots;—

"It Is Ordered by the Commission, that the general order set forth below be, and the same is hereby, adopted and designated as the Commission's General Order No. T-21:

"Wherever passenger stations or depots are maintained in Alabama by common carriers by rail . . . there shall be placed by the carrier at or near the entrance of the waiting room designated for the Negro race an appropriate sign or signs indicating the location of the colored waiting room and such sign or signs shall contain this language: 'Colored Waiting Room,' and there shall be placed by the carrier at or near the entrance of the waiting room designated for the white race an appropriate sign or signs designating the location of the 'White Waiting Room,' and such sign or signs shall contain this language 'White Waiting Room,' and the lettering on such sign or signs shall be of such size as to make the same clearly visible at a distance of at least 50 feet and such lettering shall be of a con-

tentions generally and in objections to admissibility of the regulations, recognized that as to interstate commerce neither the statute nor the regulations could survive in the face of the contrary and superior rulings (see note 5, *supra*). But as to intrastate passengers it either took the view that somehow the regulation was valid or at least the Baldwins as victims of discrimination during interstate commerce were not in a position to assert this as a class suit for intrastate travelers.

But the vice here is not the impermissible distinction between *inter* and *intrastate* commerce or even the absence of an explicit purpose coercively to compel segregated occupancy (as distinguished from the maintenance of separate rooms). What is forbidden is the state action in which color (i. e., race) is the determinant. It is simply beyond the constitutional competence of the state to command that any facility either shall be labeled as or reserved for the exclusive or preferred use of one rather than the other of the races. Certainly the state may not directly or through a municipality prescribe that a certain area of the city is to be inhabited by Negroes, another by whites, or that such areas are to be so marked even though no sanctions are imposed as to occupancy. Cf. *Shelley v. Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Harmon v. Tyler*, 1926, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831, reversing 160 La. 943, 107 So. 704, first appeal 158 La. 439, 104 So. 200; *Buchanan v. Warley*, 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149. The factor of race is irrelevant from a constitutional viewpoint. *Boson v. Rippey*, 5 Cir., 1960, 285 F.2d 43 and see especially supplemental opinion [December 7, 1960]. And in testing state action, we have recognized that there may be need of the "protection of a court order making certain that the factor of race would not be a consideration. * * *" and that there be "a decree of the trial court prohibiting the consideration of * * * race * * * as a relevant factor * * *". *Mannings v. Board of Public Instruction*, 5 Cir., 1960, 277 F.2d 370, 375.

This is not to say that integration in all activities must be governmentally compelled. We, and others, have clearly indicated to the contrary. *City of Montgomery, Alabama v. Gilmore*,

trasting color so as to provide reasonable visibility.

"It Is Further Ordered * * * that the order shall be effective as of the date hereof * * *."

"Dated * * * the 8th day of February, 1956."

5 Cir., 1960, 277 F.2d 364, at page 369 and notes 5 and 6. But the State may not either compel segregation in use or the maintenance or making of separate facilities where the criteria is race or color.

It follows that the orders of the Commission as well as the underlying statute (note 3, *supra*) are constitutionally invalid insofar as they require that the Terminal provide, maintain and mark separate facilities on the basis of race. This is so without regard to whether in fact the segregated use or occupancy of such waiting rooms is coercively compelled either by the Commission, the City or the Terminal. On remand, appropriate injunctive and declaratory orders should issue.

The Birmingham Terminal Company.

In assaying the position of the Terminal the trial seemed preoccupied with efforts to tie the Terminal into action by police officers of the City. Presumably this was to make out State action. See, e. g., 251 F.2d 780, 788 and notes 8-11. This was in response to the contention and proof offered by the Terminal that it was indifferent to where Negroes sat—either in the "Interstate and White" or "Colored Intrastate" waiting rooms—and without regard to their status as *inter* or *intra-state* travelers. We accept⁷ the District Court's finding that the proof did not show a sufficient connection between acts of City officers and the Terminal concerning any custom or practice or usage to compel Negroes to occupy the waiting room.

But again this approach was too narrow. The Terminal was admittedly a public utility holding itself out to serve all of the traveling public desiring to use the railroads operating through this station in Birmingham.⁸ As we pointed out at some length in *Boman v. Birmingham Transit Company*, 5 Cir., 1960, 280 F.2d 531, 535, one engaged in Alabama as a public utility "is doing something the state deems useful for the public

7. See note 2, *supra*.

8. The Terminal inferentially doubts that it is a "railroad company" within the meaning of the Alabama Statute, note 3, *supra*, or a "common carrier by rail" as specified in General Order No. T-2 or T-21, notes 4 and 6, *supra*. Of course, the depot is maintained solely because of the presence of the railroad facilities operated by the owner-lines who, but for the Terminal corporation, would be compelled pursuant to statute to maintain the required station. As to interstate commerce the Terminal is clearly a common carrier. 49 U.S.C.A. § 1(3) (a); *Boynton v. Commonwealth of Virginia*, 81 S.Ct. 182, 5 L.Ed.2d 206.

necessity or convenience." When in the execution of that public function it is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action within the Fourteenth Amendment. And whether it is state policy is to be determined by the nature of the activity in terms of the governmental nature of the function and not the mere presence or absence of power in the state's vicarious "agent" to impose criminal sanctions. So much is clear from *Smith v. Allwright*, 1944, 321 U.S. 649, 658, 663, 64 S.Ct. 757, 88 L.Ed. 987, 994, 997. To this may be added *Terry v. Adams*, 1952, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 and many others.⁹ *Boman v. Birmingham Transit Co.*, supra, is not to the contrary.

Here the statute infuses the Commission with power to prescribe that carriers shall maintain separate waiting rooms and this power has been effectuated by the issuance of regulations that leave nothing to the imagination. The last order compels the posting of visible signs clearly in-

dicating which waiting room is for whites and which is for colored. The state does not physically post the signs, but it does so just as effectively through the instrument of the Terminal. The very act of posting and maintaining separate facilities when done by the Terminal as commanded by these state orders is action by the state.¹⁰

As we have pointed out above the State may not use race or color as the basis for distinction. It may not do so by direct action or through the medium of others who are under State compulsion to do so. The action of the Terminal—a public utility and an arm of the State in the execution of this State policy—in posting and maintaining the signs and the separate waiting rooms on the basis of color is equally forbidden. On remand this should be appropriately prescribed by suitable injunctive and declaratory orders.

Board of Commissioners of the
City of Birmingham.

In the District Court's memorandum opinion it formally found that the "city commissioners * * * are not pursuing a custom, statute or usage which denies plaintiffs and all other Ne-

9. *United States v. McElveen*, D.C. 1959, 177 F.Supp. 355; D.C., 180 F.Supp. 10, affirmed sub. nom. *United States v. Thomas*, 1960, 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535; *Rice v. Elmore*, 4 Cir., 1947, 165 F.2d 387, 391, certiorari denied 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151; *Chapman v. King*, 5 Cir., 1946, 154 F.2d 460, certiorari denied 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025; *Baskin v. Brown*, 4 Cir., 1949, 174 F.2d 391. We think the cases warrant the following summary.

When private individuals or groups are endowed by the State with powers or functions governmental in nature they become instruments of the State and subject to the same constitutional limitations as the State itself. Thus, a private party operating a municipality acts for the State and must conform to the standards of the Fourteenth Amendment (*Marsh v. State of Alabama*, 1946, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265); a privately-owned public transportation system operating in the District of Columbia, and with its authorization, is bound by the due process clause of the Fifth Amendment (*Pollak v. Public Utilities Commission*, 1951, 89 U.S. App. D.C. 94, 191 F.2d 450, reversed on other grounds 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068); private lessees who operate publicly-owned facilities such as swimming pools or parks may not discriminate racially (*Lawrence v. Hancock*, D.C.S.D. W. Va. 1948, 76 F.Supp. 1004; *Department of Conservation & Development, etc. v. Tate*, 4 Cir., 1956, 231 F.2d 615, certiorari denied 352 U.S. 838, 77 S.Ct. 58, 1 L.Ed.2d 56); and a labor union granted the power to bargain collectively by a federal statute may not use the power to discriminate racially (*Brotherhood of Railroad Trainmen v. Howard*, 1952, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283; *Syres v. Oil Workers International Union*, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785; cf. *Steele v. Louisville & Nashville R. Co.*, 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173).

10. There can be no real question that this was done pursuant to state order. The Trial Court found as much.

"* * * [S]eparate waiting rooms in such station are provided for white and colored passengers in obedience thereto [the order T-21]. * * * This is not weakened by the continuing phrase which merely states that the Terminal takes no action to enforce separate occupancy.

"* * * the custom and usage observed by these defendants is to remit to the voluntary choice of members of both races the use of either waiting room."

In its formal answer the Terminal, of course, acknowledges the existence of Orders T-2 and T-21, see notes 4 and 6, supra, issued by the Commission. It denies that such orders require the Terminal to take any actions against an individual and denies that any such action has been taken. But it is clear from the answer that the Terminal considers that the state order does compel it to maintain the separate rooms with appropriate signs "Said order requires only that this defendant maintain waiting rooms and other facilities appropriately designated for the convenience of those who wish to conform to the long established social customs of the communities in which this defendant does business * * *." Later on it alleged: "Defendant admits that it maintains waiting rooms which make possible the separation of the races both as to those who are required by statute or order of the Alabama Public Service Commission to conform to the custom and practice of racial separation, and as to those who desire by that course, voluntarily and without respect to compulsion of law, to contribute to the maintenance of interracial good-will * * *" (Emphasis added.)

groes similarly situated the right to use the waiting room at the Terminal designated 'Interstate and White Waiting Room.' They have issued no orders during the year 1956, or subsequently thereto, pursuant to which plaintiffs and other Negroes who use such waiting room are subject to arrest and confinement in jail."

In arriving at that conclusion we may assume that the Court rejected altogether the testimony of Michel and Dr. Pitts, see note 2, *supra*, showing four specific incidents where Negroes were either arrested by city policemen or required by a policeman to move from the "Interstate and White" waiting room. Of course, the Court could not, nor did it attempt to, reject the uncontradicted testimony that on December 22, 1956, the Baldwins were arrested and taken to jail because they were in the white waiting room though in possession of interstate travel tickets. Presumably it thought these "regrettable arrests . . . which indubitably triggered this litigation . . ." was but an isolated incident and would serve no basis for declaratory or injunctive orders since on the trial of the criminal charges against the Baldwins, the state court on motion of the City entered a *nolle prosequi*.

We think, however, that the balance of the evidence—coming as it did entirely either from the Commissioner who was called as an adverse witness or by witnesses proffered by the City—demonstrates without any dispute whatsoever that there is a custom, practice and usage of the City and its policemen acting under color of office which denies equal protection of the law. As to such actions the plaintiffs are entitled to a positive declaration and appropriate injunctive orders. In reaching this conclusion, we again stress that we do not credit any testimony discredited. We do not accept any testimony rejected. We take the testimony of the City's witnesses, its Police Commissioner, its Chief of Police, another superior officer, and a patrolman precisely at its face value.

At the outset it seems quite plain that despite the extended discussion of this in our prior opinion, 251 F.2d 780, especially at pages 786-787, the District Court in its ruling seemed to believe that some specific ordinance or formally promulgated policy had to be established before the City and its agents could be said to be acting under color of office. But this is not the test. If city policemen, with the color of office which their uniform, badge, display of authority and available arms reflects, undertake as policemen

to subject persons to treatment which denies them a constitutionally protected right, it is state action. It is state action though in excess of actual legal authority or even if done without formal authorization. The record must therefore be examined to see whether the police department and its employees are undertaking to use race as the basis for determining the right of occupancy of either of the waiting rooms in the Terminal. To answer that inquiry it is necessary to take into account what was done before 1956 and that which was done (or not done) after 1956. The year 1956 has dominant significance because it was in that year that the Alabama Public Service Commission issued its order, note 6, *supra*, on signs. This in turn was precipitated by the final authoritative rulings which eliminated all doubt as to interstate commerce, see note 5, *supra*.

Prior to that time it was considered an offense—at least sufficient to call for action by a policeman in the Terminal—for a Negro to occupy the white waiting room.¹¹ Along came the ICC Order which put an end to discrimination as to interstate passengers. The police department became aware of this¹² and it brought about the

11. This was established by Captain Halley then captain of personnel and a long-time career officer of the police department who, at the time of the Shuttlesworth incident on March 6, 1957, was captain of detectives. Rev. Shuttlesworth and his wife, known integration leaders, were in the white and interstate waiting room. One had an interstate ticket, the other an intrastate ticket. On complaint by someone, Captain Halley arrived and as senior officer took over. In answer to a question whether he had known of any orders regarding segregation as to intrastate passengers, he answered:

"A. Only in this one particular instance in 1957 [Shuttlesworth] I gave instructions to not make an arrest for that specific offense unless the, unless he performed some disorder. . . ."

"Q. I believe you said that there were orders issued not to make any arrests on that particular offense. Captain, Halley, what particular offense were you referring to at that time? A. The occasion that the Rev. Shuttlesworth and his wife were sitting in the white waiting room."

After acknowledging the known existence of the 1955 ICC order on interstate passengers, he testified:

"Q. Now what, if anything, has the City of Birmingham done differently with reference to the Terminal Station since the Interstate Commerce Commission ruling? . . . A. Different?"

"Q. What have they done which is different from what they had done before the ruling? A. They have refrained from making arrests for that specific type of offense. It was considered an offense prior to the ruling."

12. For example Captain Halley testified:

"Q. Are you familiar with . . . the rulings of the Interstate Commerce Commission with respect

discussion of the steps to be taken by the police which resulted finally in the issuance of an authoritative order¹³ to check the tickets of Negro travelers to see whether they were for an interstate trip. As understood by the man on the beat, the lone patrolman called as a witness (by the City) translated this order into plain terms: On receipt of a complaint that a Negro was in the "Interstate and White" waiting room the ticket should be checked and if it was not an interstate ticket the person would be required to move.¹⁴

to segregation in the waiting room facilities? A. I am.

"Q. Do you know when that ruling came out? A. It was prior to this date, several months. I am not positive.

"Q. Prior to 1956? A. '57."

13. Defendant Connor, the Public Safety [police] Commissioner testified:

"Q. Mr. Connor, have you ever given any instructions to the police officers of the City of Birmingham with reference to Negroes sitting in the so-called white waiting room? A. Yes.

"Q. What instructions did you give them? A. Sometime in 1955, after I took office [November 1957], the Chief-of-Police asked me what we were going to do about, said he had got some calls about the Terminal Station and asked what we were going to do about it. I said as long as they have an interstate commerce ticket you can't do nothing."

Jamie Moore, Chief-of-Police since November 1955, testified:

"Q. Have you issued any instructions to officers relative to negroes sitting in the white interstate and white waiting room at the Terminal Station? A. Yes, sir, I have.

"Q. What are those instructions? A. Those instructions are that negroes who are travelling in interstate, passengers, not to bother them, not to make an arrest.

"Q. Not to make an arrest? A. Yes, sir.

"Q. Mr. Moore, in giving your instructions not to arrest any Negroes in the Terminal Station who were interstate passengers, did you ask your officers to examine their tickets to determine if they were interstate passengers or not? A. My instructions were if they received a call to ask the party they were complaining against if they were travelling interstate and to see their ticket."

"Q. By whose direction, sir, did you issue that order to determine if a passenger was an interstate passenger in the waiting room marked interstate and white passengers.

"[A] Commissioner Connor was of course familiar with the order. I discussed it with him but so far as telling me directly to issue it I would say it was my own order with his consent."

14. Patrolman Shaffner whose patrolcar covered the Terminal testified:

"Q. I will ask you whether you have received any instructions from your superiors in the Police Department? A. I have.

"Q. About Negroes sitting in the waiting room

This establishes two things. First, a Negro is treated differently and solely because of his race. He, unlike a white traveler, is required to establish his "right" to sit in the room marked "Interstate and White Intrastate Passengers." Second, the test is whether the Negro is an interstate traveler. This latter has special significance in the light of the uncontradicted pre-1956 practice, custom and usage of the Birmingham police to treat occupancy by a Negro of the white waiting room as an offense. More than that, when the impact of the ICC order led the police to conclude that it forbade any action as to interstate travelers, no order of any kind was given affecting the previous custom and usage concerning intrastate passengers.¹⁵

Of course, the intrastate as distinguished from interstate status is wholly irrelevant. Certainly since *Browder v. Gayle*, D.C.M.D.Ala.1956, 142 F.Supp. 707, affirmed 1956, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114, it is too late now to question the absolute right of Negroes engaged in intrastate commerce to be free from discrimination by police officers on the basis of race.

And yet it is plainly evident that whenever a complaint is received reporting that a Negro is sitting in the "Interstate and White Intrastate" waiting room, the police officer is required to, and does, demand to see the tickets to verify the interstate status. As to those in interstate status, this is itself a denial of equal protection by policemen since white interstate travelers are not subjected to like treatment. As to those in intrastate status, it is likewise a clear violation of the Constitution for a policeman, simply because the traveler is a Negro, to require that he

at the Terminal Station marked interstate and white waiting room? A. Yes, sir.

"Q. What are those instructions? A. We have been instructed to see if they have tickets and if they have tickets not to bother them and if they don't have tickets to make them move.

"Q. If they don't have tickets? A. Yes."

15. Commissioner Connor testified:

"Q. You have given no instruction with reference to Negroes in intrastate travel? A. No."

The Chief-of-Police, Jamie Moore, stated:

"Q. Have you issued any orders as to whether an intrastate passenger sitting in the waiting room marked interstate and white passengers, have you issued any orders to your officers concerning those persons? A. I have not."

Captain Halley, Chief of Personnel, testified:

"Q. Since the Interstate Commerce Commission ruling, has the Police Department issued any orders stating that there should not be any arrests of Negroes who were intrastate passengers sitting in the interstate and white passenger waiting room? A. I don't know of any orders that have been given on the intrastate passengers."

prove his right to be there. And it only becomes more aggravated if, after determination of status as an intrastate passenger, the policemen in accordance with the long standing custom, practice and usage not to this date rescinded requires the intrastate passenger to leave. The briefs undertake to assert that the record shows no such discrimination toward intrastate Negro travelers. But on close examination it does no such thing. All it shows is that no intrastate Negro passenger has ever been seen in the white waiting room; only interstate Negro passengers have been found there and no interstate Negro passenger has ever been required to move.¹⁶ Indeed, the sign sets up the basis of separation as to intrastate passengers. If white they go to one room, if colored to the other.

The sum of it is that on this uncontradicted record the police of Birmingham consider that

16. For example, Captain Halley, the Chief of Personnel, testified:

"Q. I believe you said you knew of no Negro sitting in the interstate and white waiting room at the Terminal Station other than the ones with interstate tickets. Is that correct? A. Yes, sir."

And Parolman Shaffner testified:

"Q. I will ask you whether or not in the past year you have seen any Negroes sitting in the white waiting room at the Terminal Station who did not have tickets? A. No, sir."

"Q. I will ask you whether or not in the past year you have seen any Negroes in the interstate and white waiting room at the Terminal Station who had intrastate tickets? A. No, sir."

"Q. Have you seen Negroes sitting in the waiting room marked interstate and white passengers? A. That is right."

"Q. Have there been many or few sir? A. Well, whenever I checked it I would say maybe once a week or twice a week I would see someone in there."

"Q. Now, Mr. Shaffner, on these occasions when you saw these people sitting there did you check their tickets? A. I did."

"Q. Do you recall whether they were interstate or intrastate passengers? A. All of them were passing through."

"Q. Going to another state? A. That is right."

the right to remain in the "Interstate and White Intrastate" waiting room requires one of two conditions: (a) the person be white or (b) if colored, he be an interstate traveler. The obverse is just as obvious: if not white or colored with an interstate status, the person must move. Negroes are entitled to be free of that discrimination at the hands of state, city and police officials. The City has, to be sure, recognized that as to interstate passengers it may not enforce its prior practices. But in the very execution of that policy, by the demand for examination of the tickets it inescapably violates the demands of the Constitution that a Negro traveler sitting in the waiting room be treated as would a white traveler on the next bench. The Negro plaintiffs and those for whom they sue as a class are entitled to appropriate injunctive and declaratory orders that will obliterate the supposed distinction between interstate and intrastate passenger status as well as the use of race or color as the basis for occupancy of either one or both of the waiting rooms of the Terminal.

The result is that the cause must be reversed and remanded for further appropriate orders as to each of the separate defendants adapted to the actions of each which we find to be in violation of the Fourteenth Amendment and the Civil Rights Acts. In reaching this conclusion we certainly do not disagree with the principles so well stated by the District Court. "While no law, or custom or usage which is the equivalent of law, may compel the segregation of races in the area of public transportation, it is equally clear that people of good will of both races are free to observe traditions which for generations have been an intimate part of their way of life." Similar and related factors set forth as reasons in support of our action led us to the modification of the decree in *City of Montgomery, Alabama v. Gilmore*, 5 Cir., 1960, 277 F.2d 364, 368-370.

Reversed and remanded.

Remand Action, District Court, April 21, 1961

Pursuant to the Mandate of the United States Court of Appeals for the Fifth Circuit, filed herein on March 22, 1961.

It is ORDERED, ADJUDGED and DECREED by the court as follows:

Alabama Public Service Commission

1. That the orders of the Commission, Alabama Public Service Commission General Order No. T-2 (1923)* and Commission's General Order No. T-21 (1956),* as well as the underlying statute, Alabama Code 1948, Title 48, Section 186, are unconstitutional and void insofar as they require Birmingham Terminal Company to provide, maintain, mark and designate separate waiting rooms on the basis of race.

2. That the defendants, C. C. (Jack) Owens and Sybil Pool, as members of the Alabama Public Service Commission, their agents, servants, employees, attorneys and successors, and all persons in active concert and participation with them, be and they are hereby restrained and enjoined:

A. From directing or otherwise requiring, either directly or indirectly, that the waiting rooms of Birmingham Terminal Company shall be marked, designated or reserved for the exclusive or preferred use of white or colored persons or any group of persons on the basis of race or color;

B. From compelling, either directly or indirectly, segregation on the basis of race or color in the use, maintenance or marking of the facilities described in paragraph 2A above;

C. From further enforcing the provisions of Alabama Code 1948, Title 48, Section 186, of Alabama Public Service Commission General Order No. T-2 (1923), and of Commission's General Order No. T-21 (1956) insofar as such statute and orders require Birmingham Terminal Company to provide, maintain or mark separate waiting rooms on the basis of race.

Birmingham Terminal Company

3. That the action of Birmingham Terminal Company in posting and maintaining the signs:

* On April 19, 1961, the Alabama Public Service Commission in its informal Docket No. C-3758 modified its General Order No. T-2 (1923) and its General Order No. T-21 (1956) so that neither of such orders is applicable to the terminal or station facilities of the Birmingham Terminal Company in Birmingham, Alabama. To deny declaratory and injunctive relief on the basis of this order would, in the opinion of the court, require an amendment of the Mandate of the Court of Appeals for the Fifth Circuit.

"Colored intrastate Passengers Waiting Room" and "Waiting Room interstate and White intrastate Passengers" and the separate waiting rooms on the basis of color is forbidden by the Fourteenth Amendment to the Constitution of the United States.

4. That the defendant Birmingham Terminal Company, a corporation, its agents, servants, employees and attorneys, and all persons in active concert and participation with them, be and they hereby are, restrained and enjoined from further or continued display or maintenance of the signs described in paragraph 4 above, from maintaining separate waiting rooms on the basis of race or color, and from posting and maintaining signs indicating that any such waiting rooms are labeled as or reserved for the exclusive or preferred use of either white or colored persons or any group of persons on the basis of race or color.

Board of Commissioners of the City of Birmingham

5. That the custom and usage of the Commission, its agents or servants, in denying to a colored person traveling in intrastate commerce the right to be or remain in the waiting room, marked or designated "Interstate and White Intrastate" is violative of the Fourteenth Amendment and 42 U.S.C. 1981, 1983.

6. That the custom or usage of the Commission, its agents or servants, in undertaking to use race as the basis for determining the right of occupancy of either of the waiting rooms is contrary to law.

7. That the defendants, J. W. Morgan, Eugene Connor, and J. T. Waggoner, as members of the Board of Commissioners of the City of Birmingham, Alabama, their agents, servants, employees, attorneys, and successors, be and they are hereby restrained and enjoined from using race or color as the basis for determining the rights of persons to use or occupy any waiting room maintained by Birmingham Terminal Company.

8. That the costs of court incurred herein be and they are taxed *in solido* against the defendants. Done, this 21st day of April, 1961.

TRIAL PROCEDURE

Appellate Review—Arkansas

Lonnie MITCHELL v. STATE ex rel. Lee HENSLEE, Superintendent of Arkansas State Penitentiary.

Supreme Court of Arkansas, May 8, 1961, rehearing denied June 5, 1961, 346 S.W.2d 201.

SUMMARY: A Negro convicted of rape and sentenced to death sought a writ of habeas corpus in an Arkansas circuit court. Petitioner's conviction had been appealed to the Arkansas Supreme Court and had been affirmed by it. *Mitchell v. State*, 230 Ark. 894, 327 S.W.2d 384 (1959). He had then moved in the circuit court to vacate the judgment on the grounds that inasmuch as the death penalty in Arkansas is imposed only upon Negro men convicted of raping white women, he was being subjected to unequal punishment in violation of the Fourteenth Amendment, and that Negroes had been systematically excluded from the jury panels. The circuit court overruled the motion to vacate and the Arkansas Supreme Court affirmed, holding that such matters should have been presented in the original appeal and that the courts had no power to rule upon them on a motion to vacate judgment. 337 S.W.2d 663 (1960). The petition for habeas corpus in the circuit court presented the same arguments as the motion to vacate. The circuit court dismissed the writ and the Arkansas Supreme Court affirmed, ruling that all of petitioner's arguments were or could have been raised on appeal, and since the original proceeding was regular on its face and the judgment was rendered by a court of competent jurisdiction, petitioner's arguments are outside the scope of a habeas corpus proceeding.

JOHNSON, Justice.

On the 11th day of April 1959, appellant, Lonnie B. Mitchell, a Negro 23 years of age, was convicted of raping a crippled white woman 77 years of age, and sentenced to death. On appeal to this Court, the judgment, which was based upon a jury verdict, was unanimously affirmed on September 21, 1959; *Mitchell v. State*, 230 Ark. 894, 327 S.W.2d 384. In that opinion we said: "The overwhelming and uncontradicted evidence proves appellant guilty beyond any shadow of a doubt. In fact, there is no contention that the evidence is not sufficient to sustain the verdict." Following this decision, appellant, on January 14, 1960, filed in the Union Circuit Court, where he was originally tried, a motion to vacate the judgment. The motion was overruled and upon appeal the decision of the trial court was affirmed on June 6, 1960. *Mitchell v. State*, Ark., 337 S.W.2d 663. Thereafter, on September 23, 1960, appellant filed the present petition for a writ of habeas corpus in the Jefferson Circuit Court. In his petition appellant alleged that his conviction was void in that the death penalty for rape in Arkansas was not imposed upon any person other than Negro men convicted of rape upon white women¹ and that such unequal punish-

ment violates his constitutional rights under the Fourteenth Amendment to the Constitution and laws of the United States. He also alleged that the trial court did not appoint him competent counsel, along with the usual allegations of systematic exclusion and/or limitation of Negroes on the jury panels.² He further claimed that his confession was coerced and that he is presently insane and was at the time of the commission of the offense.

A hearing was held on the petition for a writ of habeas corpus on September 28, 1960. No evidence was introduced and the trial court dismissed the writ and denied an appeal. Upon proper prayer this Court on November 28, 1960, granted an appeal.

For reversal of the holding of the trial court, appellant relies on two points. His first contention is that: "Appellant is entitled to a judicial

termed a point, a cursory research discloses *Needham v. State*, 215 Ark. 935, 224 S.W.2d 785, to be a recent case affirming a judgment based upon a jury verdict assessing the death penalty to a white person convicted of rape. Almost all of the cases found made no reference whatever to race, thereby rendering it impossible to tell the race of the condemned.

2. The record in *Mitchell v. State*, 230 Ark. 894, 327 S.W.2d 384, reveals that all relief sought by appellant relative to systematic exclusion and/or limitation of Negroes on the jury panels was granted. On motion of appellant, the panel was quashed, a new jury was selected and sworn according to law, and the trial then proceeded without objection.

1. Arkansas cases have not yet been digested by race. On the point here alleged, if it can properly be

inquiry into the truth and substance on the cause of his detention." In support of his contention appellant argues that the effect of the trial court's decision denies him the opportunity to prove the allegations contained in his petition.

The law relative to the scope of the inquiry when a writ of habeas corpus is petitioned is well settled in this State. It is concisely set forth in *Rowland v. Rogers*, 199 Ark. 1041, 137 S.W.2d 246, 247, as follows:

"The rule is that where a petitioner for a writ of habeas corpus is in custody under process regular on its face, nothing will be inquired into except the jurisdiction of the court whence the process came. *Ex parte Williams*, 99 Ark. 475, 138 S.W. 985."

See also *Ex parte O'Neal*, 191 Ark. 696, 87 S.W.2d 401; *State v. Martineau*, 149 Ark. 237, 232 S.W. 609; *Ex parte Foote*, 70 Ark. 12, 65 S.W. 706.

As to the allegations contained in the instant petition, they are the same as were advanced in *Mitchell v. State, Ark.*, 337 S.W.2d 663, 664. There we said:

"It is alleged in the motion that appellant is a Negro and that it is the custom and practice in Arkansas to sentence Negro men to death for raping white women, but that white men are not sentenced to death for rape; that Negroes were systematically excluded from the jury which tried him; that he is an ignorant youth (he was 23 years of age at the time); that he did not have access to effective assistance of counsel; that a purported confession made by appellant was coerced and not voluntary; that at the * * * trial he was insane and not mentally present at the trial; that he was insane at the time of the commission of the rape; that he is presently insane; and that he was denied an examination by a private psychiatrist prior to his trial. Nothing is alleged in the motion that was not or could not have been raised on appeal in the first instance except the allegation of present insanity."

The record reveals that no petition for a writ of certiorari was filed with the United States Supreme Court in the above quoted case and as we there said, nothing is alleged that was not or could not have been raised on appeal except the allegation of present insanity. Thus

the language in *Goodman v. Storey*, 221 Ark. 308, 254 S.W.2d 63, 64, is applicable here:

"In *Brandon, Ex Parte*, 49 Ark. 143, 4 S.W. 452, the court said: '* * * an application for habeas corpus cannot be made to perform the function of an appeal, or writ of error, in correcting errors and irregularities at the trial. To authorize the judge of the superior court to interfere and discharge a convicted prisoner in this summary fashion, the sentence must be a nullity, or the court which imposed it must have been without jurisdiction.'"

Therefore, since the record reveals that the trial court found the appellant to be in custody under process regular on its face, and that the court from which the process issued was the court of competent jurisdiction, from what we have said above, and the record before us, we find nothing to indicate that the trial court erred in its judgment. As to appellant's allegation of present insanity, that question can be determined as provided by Ark.Stats. § 43-2622.

Appellant's remaining contention for reversal is that: "Each state must provide a clearly defined post conviction remedy by which claims of infringement of federal rights may be asserted."

In support of this contention appellant argues that to hold that habeas corpus cannot be used to enforce his constitutional rights deprives him of an opportunity to assert such rights. He then cites *Young v. Ragen*, 337 U.S. 235, 69 S.Ct. 1073, 93 L.Ed. 1333, in support of his view that a State must provide a post conviction remedy for the vindication of his constitutional rights. In our view, Arkansas does provide a post conviction remedy, i. e., an appeal whereby he can assert any alleged deprivation of his constitutional rights. If he fails to take advantage of this opportunity, the State need not provide him with limitless other methods whereby he could forever prolong the litigation. In *Daniels v. Allen (Brown v. Allen)*, 344 U.S. 443, 503, 73 S.Ct. 437, 444, 97 L.Ed. 469, the question now raised was disposed of in the following language:

"Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a State's procedural rule requiring that certain errors be raised on appeal. Normally rights under the Federal

Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, and may likewise be waived by failure to assert such errors on appeal. Compare *Frank v. Mangum*, 237 U.S. 309, 343, 35 S.Ct. 582, 59 L.Ed. 969. When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus.

Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. See *Adams v. United States ex rel. McCann*, *supra*, 317 U.S. at page 274, 63 S.Ct. at page 239. Compare *Sunal v. Large*, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982, with *Johnson v. Zerbst*, 304 U.S. 458, 465-469, 58 S.Ct. 1019, 1023-1025, 82 L.Ed. 1461."

Affirmed.

TRIAL PROCEDURE

Bias of Jurors, Prejudicial Remarks—Louisiana

STATE of Louisiana v. Henry HILLS.

Supreme Court of Louisiana, November 7, 1960, On Rehearing, April 24, 1961, 129 So.2d 12.

SUMMARY: A Negro, convicted in a Louisiana state court and sentenced to death for the rape of a white woman, appealed to the state supreme court. Among others, exceptions were taken to the trial court's rulings sustaining the state's objections to defense counsel's questioning prospective jurors as to whether they were members of or in sympathy with any religious, integration or segregation groups. The supreme court held these exceptions to be without merit, noting that the jury panel had been questioned as to whether the variance in race of the prosecuting witness and the accused would cause the jurors to have any particular or personal bias against defendant. The court ruled that the proffered questions were too general, and would have confused the issues rather than determining the jurors' impartiality. Defendant also excepted to the trial court's overruling his objection to the assistant district attorney's twice describing him in the argument as a "primitive beast of the jungle." After reviewing the prosecutrix' testimony, the supreme court held that the remarks were deductions and conclusions drawn from that testimony and were not an appeal to prejudice. The conviction and sentence were affirmed. Subsequently, a rehearing was granted and thereupon the conviction and sentence were set aside and reversed and the case remanded for a new trial, three justices dissenting. The court emphasized that wide latitude is to be allowed counsel in examining jurors on voir dire so as to uncover any likelihood of prejudice in a juror's mind which might affect, even subconsciously, his decision, and thereby enable counsel to decide whether or not to make a peremptory challenge. It was held that the questions, although "inartistically phrased" were proper because membership in an organization advocating racial segregation might be regarded as a proper notification upon which the defendant could wish to base a peremptory challenge.

HAMLIN, Justice.

The defendant, Henry Hills, appeals from his conviction of a violation of LSA-R.S. 14:42 (Aggravated Rape) and sentence of death, presenting for our consideration fourteen bills of exceptions reserved during the course of trial.

Because of their similarity, Bills of Exceptions Nos. 1 and 2 will be discussed jointly.

Bill of Exceptions No. 1 was taken to the ruling of the trial judge, which sustained the objection of the State to a question collectively propounded to six prospective jurors under the following circumstances:

"Mr. Gulotta, counsel for the defendant:

"Q. Are any of you in sympathy with any integration or segregation organizations?" (Emphasis ours.)

Objection by the State.

"Mr. Gulotta:

"We submit, may it please Your Honor, it is a proper question for the purpose of determining the mental condition of these jurors with reference to the issue in this case."¹

"Mr. Dowling, District Attorney for the Parish of Orleans:

"They can ask whether or not they are prejudiced against this particular individual. They can't simply take the whole race, or the whole people of the organizations, or anything of that sort.

"By the Court:

"I believe for any juror to be qualified, he would have to state under voir dire that he did not have any prejudice against any individual. The Court sustains the State's objection. I think you are going too far afield."

In Bill of Exceptions No. 1 counsel for the defendant state that prior to the propounding of the above question, previous prospective jurors on voir dire examination were asked the same or similar questions without objection by the State. They allege that two of the previous prospective jurors stated that they were members of the Citizens Council of New Orleans, a pro-segregation organization, and that the defendant, through his counsel, peremptorily challenged and excused the two jurors.

Bill of Exceptions No. 2 was reserved to the ruling of the trial judge which held that the following question, collectively propounded to six prospective jurors by counsel for the defendant, was objectionable and had the effect of enlarging the scope of personal prejudice:²

1. The defendant was a colored male on trial for the capital offense of rape of a white female.
2. In Bill of Exceptions No. 2, counsel for defendant aver: "That His Honor, the Trial Judge, then, before any other question or questions along the same line could be asked said prospective jurors, interposed an objection to the said line of voir dire examination, and stated that the question was objectionable because the defense was trying to enlarge the scope of personal prejudice."

The Trial Judge, in his Per Curiam, states: "The Court takes exception to Bill of Exception No. 2, as drawn by defense counsel, wherein it is stated in

"Do any of you gentlemen belong to any religious or segregation groups?" (Emphasis ours.)

In Bill of Exceptions No. 2 counsel for the defendant allege that the above question was propounded for the purpose of ascertaining and determining whether the prospective jurors were biased and prejudiced in arriving at a verdict and passing judgment on the guilt or innocence of the accused.³

The trial judge was of the opinion that the questions propounded to the prospective jurors were irrelevant and confusing, too general, and did not in any way tend to meet the test of a competent juror. He was of the further opinion that counsel for the defendant were trying to enlarge the scope of what could be considered legal prejudice or legal bias.

Counsel for the defendant admit in brief that they were not entitled to challenge for cause those prospective jurors who would have answered that they were members of segregation groups or organizations, or that they were segregation sympathizers,⁴ but they contend that in

paragraph 2 that the trial Court, before any other question or questions along the same line could be asked said prospective jurors, interposed an objection to the said line of voir dire examination. The Court wishes to state that such was not the case, and that many questions had been asked as to the particular prejudice or bias of the prospective jurors with respect to racial relations and the primary fact that the defendant was of the colored race and the prosecutrix was a white female. At no time did the Court interpose an objection, nor did the State, through the District Attorney, interpose an objection.

"Further, in Bill of Exception No. 2, filed by the defense counsel, it is stated that to save time it was agreed and understood by the State and by the defense and the Court that the Court's ruling on Bills of Exceptions Nos. 1 and 2 would apply to the voir dire examination of other prospective jurors examined subsequent to the said ruling by the Court. Such statement is correct. It was merely another way of saying that if the same question or the same type of question was asked, that the Court's ruling would be consistent and would be the same."

3. In his Per Curiam to Bill of Exceptions No. 1, the Trial Judge states:

"The objection made by the State, through the District Attorney, Mr. Dowling, was that the defense, on voir dire examination, could ask any juror whether or not that particular juror was prejudiced against this particular individual, but that they could not go further and take the whole race or the whole people of an organization and ask a general question, which could be answered so generally that in no way would it indicate a prejudice against the particular individual."

4. In the case of State v. Dunn, 161 La. 532, 109 So. 56, Error Dismissed, 273 U.S. 656, 47 S.Ct. 344, 71 L.Ed. 825, we held that because a juror tendered an

order that they might have used the twelve peremptory challenges allowed by law to their best interest and advantage and as judgment dictated, the questions propounded to the prospective jurors as to whether they were members of segregation groups or organizations, or whether they were segregation sympathizers, were legally proper and should have been allowed, and that the trial judge's denial of an opportunity to so question these prospective jurors was a denial of a fair and impartial trial by a fair and impartial jury, a denial of Due Process of Law and equal protection of the law under the Fifth and Fourteenth Amendments of the Constitution of the United States, and a denial of the defendant's rights under the Bill of Rights of the Constitution of the State of Louisiana. Article I, Section 10, Louisiana Constitution of 1921, LSA; LSA-R.S. 15:354.

It is to be noted at the outset, as stated by the trial judge, that this is not a case involving the opening or closing of a school, or the integration of a school, or a question involving the acceptance or non-acceptance of the United States Supreme Court decision (*Brown v. Board of Education of Topeka*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083) on the question of racial discrimination in public education. It concerns the capital crime of aggravated rape alleged to have been committed by a colored man upon a white woman.

The record discloses that the trial judge was fully cognizant of LSA-R.S. 15:422(6), which recites that judicial notice is taken of racial conditions prevailing in this State. Prior to the examination on voir dire of any of the members of the prospective jury panel, he made the following statement:

"Gentlemen of the Jury, I think I should read the qualification needed to serve as a petit juror in this case. I am reading it not only for the benefit of the jurors in the box, but for those on the rest of the panel as well. In order to serve as a grand juror or a petit juror in any of the Courts of this State, you must be a citizen of this State not

accused on trial for murder was a member of the Ku Klux Klan, of which the deceased was also a member, or of that organization and of the same church and Bible class of which the deceased was a member, and of which church he was an officer, he was not incompetent, when it appeared that, notwithstanding the affiliations, the juror had not become biased or prejudiced in the case, and was in a position to decide it fairly and impartially.

less than 21 years of age, a bona fide resident of the Parish of Orleans one year preceding service on this particular panel, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, providing there shall be no distinction on account of race, color or previous condition of servitude. I make this mention to you gentlemen so that you will understand that unless you meet these qualifications you would not be qualified to serve as a juror. Unless someone signifies he does not meet these qualifications, the Court will assume you do meet them."

The record further discloses that prior to the taking of the instant bills of exceptions, questions were propounded to the jury panel as to whether the variance in race of the prosecuting witness and the accused would create a bias or prejudice in their minds. There were no indicative answers that this fact would cause the jurors to have any particular or personal bias or prejudice against the defendant because of that fact alone. The following question with respect to the particular offense of rape was asked of the jurors:

"Do any of you gentlemen of the jury have a particular or personal prejudice for the crime of aggravated rape in and of itself?"

LSA-R.S. 15:357 sets forth that the purpose of the examination of jurors is to ascertain the *qualifications* of the juror in the trial of the case in which he has been tendered, and the *examination shall be limited to that purpose.*

"The term 'qualification' * * * has reference to the state of the juror's mind and not to his experience in serving on juries, or the lack of such experience. The purpose of the examination is to determine whether the juror stands indifferent between the state and the prisoner. He is considered indifferent when he is neither biased in favor of nor prejudiced against the accused; when he has not formed or expressed an opinion as to the guilt or innocence of the accused; and, finally, when he entertains no conscientious scruples which would prevent him from carrying the law into effect, the object of the law being to select impartial jurors to try the issue between the state

and the accused. * * * State v. Swain, 180 La. 20, 156 So. 162, 163.

Our law is well settled that a defendant has no right to a trial by any particular jury or jurors, but has the right only to a trial by a competent and impartial jury. State v. McLean, 211 La. 413, 30 So.2d 187; State v. Ramoin, 160 La. 850, 107 So. 597. The presiding judge has discretion in passing upon the qualifications of jurors, and, in this State, his rulings on matters of that character will not be set aside by the reviewing court unless the error is manifest. State v. Collier, 161 La. 856, 109 So. 516; State v. Kifer, 186 La. 674, 173 So. 169, 110 A.L.R. 1017; State v. Addison, 134 La. 642, 64 So. 497; State v. Chandler, 178 La. 7, 150 So. 386.

"In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him; and when tried by jury shall have the right to challenge jurors peremptorily, the number of challenges to be fixed by law." Article I, Section 10, Louisiana Constitution of 1921. In the trials of criminal prosecutions punishable with death or necessarily with imprisonment at hard labor, each defendant shall be entitled to challenge peremptorily twelve jurors, and the prosecution twelve for each defendant. LSA-R.S. 15:354. A juror may be challenged because he is not impartial, the cause of his bias being immaterial. LSA-R.S. 15:351 (1).

At the time the questions, supra, were disallowed on voir dire examination of prospective jurors, the defense had used two peremptory challenges. Despite this fact, counsel for the defendant contend that had they secured affirmative answers to their questions which would not have been a basis for a challenge for cause, supra, they could, nevertheless, have protected the accused against a juror or jurors unacceptable to them by using the ten remaining peremptory challenges, which, under the law, they had a legal right to use as they thought proper, thereby exercising the right of rejection rather than the right of selection. State v. Henry, 196 La. 217, 198 So. 910; State v. Ferguson, 187 La. 869, 175 So. 603.

Counsel for the defendant cite the cases of Smith v. United States, and Brown v. United States (decided in one opinion), 4 Cir., 262 F.2d 50, in which the United States Court of Appeals held that counsel for appellants should have been permitted by the trial judge to ask

prospective jurors on the voir dire examination whether they were members of the Ku Klux Klan or the White Citizen's Council; Raymer v. State, 32 Okl.Cr. 385, 241 P. 499, in which the Criminal Court of Appeals held that the refusal of the trial court to permit counsel for defendants to question jurors as to membership in the Ku Klux Klan was reversible error; and, State v. Tighe, 27 Mont. 327, 71 P. 3, where the Supreme Court of Montana held that it was proper for counsel for defendant to ask each juror, when called and sworn on his voir dire, whether he was a member of the Knights of Pythias, or of the Order of Odd Fellows, or of the Order of Sons of Hermann. We do not think that these cases are apposite because the questions propounded on voir dire examination of prospective jurors therein were particularized as to specific organizations and not generalized as in the instant matter.

We agree with the trial judge that the propounded questions, supra, were too general. He correctly stated in his per curiam to Bill of Exceptions No. 1, which reasoning also covers Bill of Exceptions No. 2:

"* * * the question is not whether they belonged as members or officers or whether they contributed money or physical efforts to any particular organization, but, rather, if they were in sympathy with either a segregation organization or an integration organization. Counsel for the defense states that it was for the sole purpose of determining the mental condition of the prospective jurors.

"The Court fails to see how the mental condition of a prospective juror concerning this particular defendant, in this particular case, and this particular complainant or victim, and how the answer to the question could in any way give some notice as to the mental condition of the prospective juror.

"The question looms up, what does the word 'sympathy' mean? Many times an appellate Court or a trial Court has sympathy for a particular litigant or defendant, and yet, must, per se, because of the law, rule against the individual, so that in and of itself sympathy does not indicate or should not indicate that a person would want to render a decision for a particular individual merely because he has sympathy for said individual.

"The question is so general, and the Court wonders how the prospective jurors could answer such a question, whether they would answer yes or no. It was a double jointed question."

We do not find that the trial judge abused his discretion, prejudiced the defendant, impaired the constitutional and statutory rights of peremptory challenge and rejection allowed the defendant, or committed manifest error. He complied with the essential demands of fairness (*State v. Henry*, 196 La. 217, 198 So. 910) in sustaining the objections advanced by the State to the general questions, *supra*. To have permitted the general questions, *supra*, to have been answered would not have determined the impartiality of the jurors but would have simply confused the issues of this cause.

* * *

Bills of Exceptions Nos. 9 and 10 were reserved to the trial court's overruling counsel's objections to the Assistant District Attorney's description of the defendant as "this primitive beast of the jungle," and to his statement, "I wish I could call him worse than a primitive beast of the jungle," which were made during opening argument before the jury.

Counsel for the defendant argue that the phrase and statement were prejudicial, unfair, and improper. With respect to the statement, "I wish I could call him worse than a primitive beast of the jungle," counsel state in brief:

"That in our humble opinion, was not a legitimate argument or inference from the facts of the case. It was a manifest appeal by the prosecuting officer to the prejudice of the jury by injecting into the case his personal feelings and personal sentiments."

LSA-R.S. 15:381 recites:

"Counsel may argue to the jury both the law and the evidence of the case, but must confine themselves to matters as to which evidence has been received, or of which judicial cognizance is taken, and to the law applicable to the evidence; and counsel shall refrain from any appeal to prejudice."

LSA-R.S. 15:382 further provides:

"Counsel have the right to draw from the evidence received, or from the failure to produce evidence shown to be in the possession of the opposite party, any conclusion which to them may seem fit, but counsel

have no right to draw from such evidence or suppression of evidence an incorrect conclusion of law."

In interpreting the above articles our jurisprudence has held:

"While it is better to omit such opprobrious terms in referring to an accused, although there is evidence in the record, as there is here, tending to establish that the accused are of that type of men, (the district attorney remarked: "So now we get the defense that the negroes "hijacked" these two rats") nevertheless, we feel satisfied that the remark of the district attorney, so classifying the accused, did not operate to their prejudice. It is only in an extreme case of gross misconduct, of such nature as to influence the jury, that a verdict will be set aside by reason of improper remarks made by the district attorney, and the court should then feel that the remarks contributed to the verdict found. *State v. Johnson & Butler*, 48 La. Ann. 87, 19 So. 213; *State v. Hamilton*, 124 La. 132, 137, 49 So. 1004, 18 Ann. Cas. 981." *State v. Davis*, 178 La. 203, 151 So. 78, 80. Cf., *State v. Tucker*, 204 La. 463, 15 So. 2d 854.

"A prosecuting officer is required to base his argument and his deductions and conclusions upon the evidence adduced during the trial and should, therefore, confine himself to a discussion of the case as presented with such reasonable comment thereon as the evidence may warrant. However, this court will not ordinarily set aside a verdict and grant a new trial because of the impropriety of a statement made by the district attorney in his argument to the jury, * * * providing it does not appear from the record that the jury was influenced by such remark or that the same contributed to the verdict returned by them. * * *" *State v. Fletcher*, 210 La. 409, 27 So. 2d 179, 183.⁸

"It is a well-settled principle that as a matter of law, the prosecuting officer has the right to press upon the jury any view of the case arising out of the evidence—the Supreme Court is bound to credit jurors with common intelligence, conscientious-

8. The quotation is a correct statement of the law even though the conviction and sentence were set aside.

ness, and sense of duty. To justify setting aside a verdict of a jury, approved by the trial judge, on the ground of intemperate or improper remarks made by a District Attorney, we would have to be thoroughly convinced that the jury was influenced by such remarks, and also, that the remarks contributed to the verdict found. * * *
State v. Alexander, 215 La. 245, 40 So.2d 232, 234. See, *State v. Labat and Poret*, 226 La. 201, 25 So.2d 333.

All of the evidence is made a part of Bill of Exceptions No. 17, which was reserved to the overruling of the defendant's motion for a new trial. That bill will be discussed *infra*. The testimony of the prosecutrix describes in detail the offense which she alleges the defendant committed upon her. She states that when she was about to enter her apartment on the night of March 28, 1958, the defendant approached her and finally forced her into an alley, telling her that he had a gun. There, she says, he told her to remove her clothes—even though she was in her period—and knocked her to the cement. He hit her in the face and stomach and forced her to have intercourse with him three times. She also alleges that he tried to force his sex organ into her mouth.

The phrase and statement of the Assistant District Attorney—"this primitive beast of the jungle," and "I wish I could call him worse than a primitive beast of the jungle,"—are, in our opinion, deductions and conclusions drawn from the testimony of the prosecutrix. They are not violative of LSA-R.S. 15:381 and 15:382, *supra*,⁹ nor are they an appeal to prejudice.

For the reasons assigned, the conviction and sentence are affirmed.

9. In *State v. Goodwin*, 189 La. 443, 179 So. 591, 599, Bill of Exceptions No. 5 was reserved to the court's permitting an alleged vituperative argument to the jury. The bill shows that, while the assistant district attorney was "arguing his appreciation of the evidence and drawing his conclusions therefrom, he stated that Goodwin was a man who was actuated by primitive instincts and not by reason. * * *" This Court agreed with the trial judge that there was evidence in the record from which the assistant district attorney could logically and fairly argue that the conduct of the accused showed he was acting by primitive instincts as a creature of the jungle and not by reason. See, *State v. Meche*, 114 La. 231, 38 So. 152; *State v. Spurling*, 115 La. 789, 40 So. 167; *State v. Riggio*, 124 La. 614, 50 So. 600; *State v. Thomas*, 161 La. 1010, 109 So. 819; *State v. Hoover*, 219 La. 872, 54 So.2d 130; *State v. Brazile*, 234 La. 145, 99 So.2d 62.

On Rehearing

FOURNET, Chief Justice.

After affirming the conviction and sentence in this case we granted a rehearing, limited to a reconsideration of Bills of Exceptions Nos. 1, 2, 14 and 15.¹

Bills Nos. 1 and 2 were reserved to the ruling of the Trial Judge sustaining the State's objection to questions propounded collectively to six veniremen tendered to the defense by the State on their voir dire examination. Counsel for defendant asked the prospective jurors—the fact having been previously brought out that the defendant was a colored man and the victim of the alleged rape a white woman—(1) if they were "in sympathy with an integration or segregation organizations," and (2) whether any of them belonged to any "religious or segregation groups." Following the first question, the District Attorney objected that while a prospective juror might be interrogated as to his prejudice against the particular individual accused, the question "could not take in the whole race or the whole people of an organization;" counsel for defendant stated that the sole purpose was to determine the mental condition of the prospective jurors concerning the defendant; the Trial Judge sustained the objection (to which ruling Bill of Exception # 1 was reserved) and in his *Per Curiam* stated that the question was irrelevant, was too general for the answer to indicate prejudice against any individual; was confusing to the Court and the jurors and was an attempt to enlarge the scope of what could be considered legal prejudice or legal bias; and when the defendant's attorney propounded question (2) above, the Court ruled the question out, stating it was objectionable because the defense was trying to enlarge the scope of personal prejudice. In the *Per Curiam* to the Bill of Exception (No. 2) reserved to that ruling, the view was expressed that the same legal point was involved as in the first Bill and the Court asked that the reasons given in reply to the first Bill be considered as applying to and being made part of the second.

It is a general view as to voir dire examination that the defendant in a criminal prosecution is entitled to make reasonable and pertinent inquiries of the prospective juror so that he may

1. Seventeen bills of exceptions were reserved to the rulings of the Trial Court.

exercise intelligently and wisely his right of peremptory challenge—since each party has the right to put questions to a juror not only to show that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will make a peremptory challenge. For this reason, a wide latitude is allowed counsel in examining jurors on their voir dire, and the scope of inquiry is best governed by a liberal discretion on the part of the Court so that if there is any likelihood that some prejudice is in the juror's mind which will even subconsciously affect his decision, this may be uncovered. It is by examination into the attitudes and inclinations of jurors before they are sworn to try a case that litigants are enabled to reject those persons, by use of peremptory challenges where necessary, who are deemed to be unlikely to approach a decision in a detached and objective manner.² The Constitution itself (La.Const. of 1921, Art. 1, Sec. 10) guarantees to the accused the right to peremptorily challenge jurors, "the number of challenges to be fixed by law;" that number, in the trial of any crime for which the penalty is death or necessarily imprisonment at hard labor, is twelve (R.S. 15:354). The intelligent exercise of the right of rejection, by use of those twelve peremptory challenges, is the meat of the privilege, and can be substantially weakened by a restriction of questions—the answers to which might be regarded as informative of a juror's attitude and therefore of vital importance to his defense. In *State v. Henry*, 196 La. 217, 198 So. 910, 915, this Court quoted with approval from 35 C.J. at pages 387, 405 and 406; " . . . parties have a right to question jurors on their examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge, and . . . it is error for the court to exclude questions which are pertinent for either purpose. . . . The right of peremptory challenge is a substantial right, and its freest exercise should be permitted." " (Emphasis supplied.)

Upon the facts revealed by the bills under

discussion and the Per Curiam thereto, it is clear that the inquiry proposed in the instant case, though inartistically phrased, was a proper one, and we fail to discern anything in its nature that would warrant denial of the privilege of eliciting a reply as to membership in a segregation group or organization. Information as to affiliation with various associations is often sought by defense counsel³ and while such membership does not necessarily disqualify one for service as a juror,⁴ counsel have the right in good faith to ask jurors if they are members of organizations in order that defendant may make a more intelligent exercise of his right to challenge jurors peremptorily without cause, and thus promote the selection of a jury that is free from even an implied bias.⁵ Membership in an organization advocating segregation of the races might be regarded as a proper notification upon which the defendant could wish to base a peremptory challenge.⁶ In numerous cases refusal to allow counsel to so interrogate the jurors for the purpose of laying a foundation for peremptory challenge has been expressly denominated reversible error.⁷

The prejudicial ruling in such case is not cured by the fact (as stated in the Per Curiam) that at the time the above questions were disallowed, the defense had used only two peremptory challenges, and that prior to the trial of the cause twelve jurors were peremptorily ex-

2. 31 Am.Juris. 121, Verbo Jury, Sec. 139; 54 A.L.R.2d 1210 et seq.; *State v. Higgs*, 143 Conn. 138, 120 A.2d 152, 54 A.L.R. 2d 1199; *Pendergrass v. State*, 121 Tex. Cr. 213, 48 S.W.2d 997; 73 A.L.R. 1209, Anno. Juror, Racial or other Prejudice; *People v. Car Soy*, 1880, 57 Cal. 102; 50 C.J.S. Verbo Juries § 280, p. 1068.

3. See comprehensive annotation, 158 A.L.R. 1361 et seq., "Membership in secret order or organization for the suppression of crime as proper subject of examination, or ground of challenge, of juror," supplementing 31 A.L.R. 411.

4. *State v. Dunn*, 161 La. 532, 109 So. 56, writ of error dismissed 273 U.S. 656, 47 S.Ct. 344, 71 L.Ed. 825.

5. For a good statement of the principle see *Allen v. State*, 28 Okl.Cr. 373, 231 P. 96; 158 A.L.R. at page 1365; and in *Buchanan v. State*, 33 Okl.Cr. 312, 243 P. 992, the Criminal Court of Appeals of Oklahoma aptly observed: "The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury. In conferring this right the law gives effect to the natural impulse to eliminate from the jury, not only persons who are rendered incompetent for some of the disqualifying causes named in the statute, but persons who by reason of politics, religion, environment, association, or appearance, or by reason of the want of information with reference to them the defendant may object to their service upon the jury, to which the disposition of his life or liberty is submitted."

6. See *Wasy v. State*, 234 Ind. 52, 123 N.E. 2d 462, 46 A.L.R.2d 1389.

7. See *State v. Hoelscher*, 217 Mo.App. 156, 273 S.W. 1098; *Memefee v. State*, 30 Okl. Cr. 400, 236 P. 439; and the numerous other citations forming a paragraph in 154 A.L.R. at page 1364.

cused by the defense. Counsel may have accepted, among the six veniremen tendered, jurors he would otherwise have challenged peremptorily, and he was therefore deprived of information to which he was entitled to enable him to exercise judiciously his right of peremptory challenge. The defendant is entitled to an impartial jury, and may make such inquiries as will enable him to secure that constitutional right; and while one may not be incompetent

as a juror, yet he may hold views which, if known to the accused, would be deemed a good reason for use of a peremptory challenge. If defendant is blindly to make his peremptory challenges, he may strike from the panel the very men whom he would have wished to retain, and retain those he would have refused.⁸

* * *

8. See *State v. Mann*, 83 Mo. 589; 31 A.L.R. 413.

TRIAL PROCEDURE

Change of Venue—Mississippi

William STOKES v. STATE of MISSISSIPPI

Supreme Court of Mississippi, March 6, 1961, 128 So.2d 341.

SUMMARY: A Negro man charged with the murder of a white woman moved the Jones County, Mississippi, circuit court for a change of venue, on the grounds that public feeling was inflamed against him because he is a Negro male and the deceased was a white woman of a very prominent family; that a large reward was publicized for the apprehension of defendant; that there was fear of mob violence; and that inflammatory speeches against defendant were made by highly respected attorneys requested by the court to represent him. The motion was overruled, and defendant was convicted and sentenced to be executed. On appeal, the state supreme court affirmed. The court determined that there was no proof on the record of the allegedly inflammatory statements by the attorneys; that six witnesses for the state testified that in their opinion defendant could get a fair trial; that the trial court had properly considered all the proceedings in the voir dire examination of prospective jurors in deciding whether defendant could get a fair trial; and that testimony indicated that there had been no talk of mob violence. Pointing out that twelve of thirty-eight persons examined were disqualified for jury service because they had opinions, the court held that the voir dire examination showed that a fair proportion of the jurors of the county were qualified for service. Excerpts from the opinion on this point are printed below.

McELROY, Justice.

This case originated in the Second Judicial District of Jones County, Mississippi. William Stokes was indicted on the twenty-fourth day of March, 1960. The indictment charged that he, on or about the third day of March, 1960, in the county and district aforesaid, did wilfully and unlawfully, feloniously and with malice aforethought, kill and murder one Mrs. Eula Clark, a human being, and against the peace and dignity of the State of Mississippi.

The accused was indicted by the grand jury on the twenty-fourth day of March, 1960. Three attorneys were appointed to represent him and the defendant was arraigned March 30. On

April 8, a motion for a change of venue and continuance was overruled. A special venire of one hundred men was drawn and the trial was set for April 13. He was convicted and sentenced to be executed.

* * *

The appellant contends that the court erred in overruling the motion for a change of venue and a continuance. He sets up many grounds in the motion, such as: "The defendant is a male member of the Negro race, has incensed and inflamed the public feeling against him and that the deceased was a white woman of a very prominent family. There was local bitterness against the defendant, that there was publicized a large reward for the apprehension of the defendant and that there was fear of mob

violence. That in the appointment of the attorneys inflammatory speeches against the defendant made by some of the attorneys that the court asked to represent the defendant. That these attorneys were widely known throughout the county and adjoining counties and were held in high respect by the public. That one was an immediate past county attorney and immediate past district attorney." This motion was sworn to by Stewart J. Gilchrist and William O. Dillard.

There is no proof in the record that such statements were made by the attorneys. The court made the statement that any reasons or excuses the attorneys had for not being appointed would be made in chambers. However, there is a news item in the local paper making such a statement. The only record that was made in open court in reference to the appointment of the attorneys was as to the state of health and if they had any other statements to make that it would be made in chambers before the judge.

There is much proof on this motion for a change of venue and it was carried out by testimony of the witnesses through the questioning and selection of the jury in the trial of the case. Six witnesses testified for the State that in their opinion the defendant could get a fair trial. Four witnesses testified for the defense. The court properly considered all of the proceedings in the voir dire examination of the prospective jurors in determining whether or not defendant could get a fair trial.

In *Keeton v. State*, 132 Miss. 732, 96 So. 179; *Jones v. State*, 133 Miss. 684, 98 So. 150, it was held to the effect that where the people of the county have not prejudged the defendant's case, then there is no prejudice against the accused and that the voir dire examination of the prospective jurors shows that a fair proportion of the jurors of the county are qualified for service in the case, it is not error for the trial judge to overrule a motion for a change of venue.

In this case the voir dire examination shows that a fair proportion of the jurors of the county were qualified for service. Twelve out of thirty-eight jurors examined were disqualified because they had opinions. The court must look to all the attendant facts and circumstances and should not and will not reverse a trial judge in the exercise of his discretion if a fair proportion of the jurors examined can give the defendant a fair trial. *Shelton v. State*, 156 Miss. 612, 126 So. 390.

In *Shimniok v. State*, 197 Miss. 179, 19 So.2d 760, the Court held the rule for our guidance in such cases was stated in *Wexler v. State*, 167 Miss. 464, 142 So. 501, where it was said: "The granting of a change of venue is so largely in the discretion of the trial court that a judgment of conviction will not be reversed on appeal, on the ground that a change of venue was refused, unless it clearly appears that the trial court abused its discretion." [197 Miss. 179, 19 So.2d 763]

In this particular case the questioning went on through the motion for a change of venue and in the voir dire examination.

On behalf of the State a witness who was a former legislator and was well known throughout the county stated that he believed that the defendant could get a fair and impartial trial, that the people had not prejudged the case, that there was no talk of mob violence, that the case was no more than any other charge of murder. The sheriff of the county testified that the defendant could get a fair and impartial trial, that he had talked to a lot of people and had found no one who had prejudged the case, that there had been more than \$500 obtained for the purpose of a reward, that there had been some talk that the defendant was surrounded in a community of the county but no one expressed themselves about mob violence but, to the contrary, they wanted to apprehend the person for the purpose of turning him over to the authorities, believing that he could get a fair trial in the county. The other four witnesses' testimony was to the same effect. The court was certainly within its right in overruling this motion after the testimony was offered on the change of venue and the question on the voir dire examination.

In *Wheeler v. State*, 219 Miss. 129, 63 So. 2d 517, 521, 68 So.2d 868, 70 So.2d 82, it was held: "Dealing first with the motion to change the venue, it is obvious that the killing of two policemen of the City of Hattiesburg, while on duty, would cause considerable publicity both through the newspapers and over the radio. Of course, some people are impulsive and jump to conclusions from a mere smattering of the facts. But, the great majority of people withhold their judgment until they ascertain all of the facts. One may feel that, assuming a certain state of facts to exist, his conclusion would be thus and so; but, not knowing whether this assumption is true or false, he is able to cast it out of his

thinking, and, if chosen as a juror, will look upon the accused as innocent, disregard what he has heard, and require the State to prove his guilt beyond every reasonable doubt.

"A number of witnesses, testifying for the accused, were of the opinion that a large majority of the people with whom they talked held fixed opinions that he was guilty. A greater number, testifying for the State, were of a contrary view, and expressed the opinion that the accused would be accorded a fair and impartial trial in the county. Forrest is one of the most densely populated counties in the State. A jury was obtained from the original special venire of 75, plus the 2 regular juries for the week, and plus an additional venire of 62, or a total of 161. Of this number, 18 were excused on account of partial or fixed opinions, and 16 because of conscientious scruples against the infliction of the death penalty. Less than 12% of the prospective jurors had made any prejudgment of the case. The entire voir dire examination appears in the record. It reflects vigilance on the part of the trial judge to see that a fair and impartial jury should be empaneled to try the case. Moreover, appellant had already accepted 10 jurors before his peremptory challenges were exhausted.

"On this proposition there is great similarity in the facts of this case and the case of *Shimniok v. State*, 197 Miss. 179, 19 So. 2d 760. In that case, the deceased was an ex-sheriff and a very popular man in Wayne County. The defendants were strangers. Much publicity had been given to the killing through the newspapers and otherwise. The evidence for the State was to the effect that the case had not been prejudged by the public and that the appellants could obtain a fair and impartial trial before a jury from that county. From the special venire of 150 men, it appeared that ten were excused on account of fixed opinions. The Court in its opinion referred to the fact that the trial judge saw the witnesses, who testified on the motion, and the potential jurors as they were being questioned, and concluded that he was in much better position to judge of their credibility than was the appellate court. Under such circumstances it was there held that the trial judge had not abused his discretion in overruling the application for change of venue. See also *Wexler v. State*, 167 Miss. 464, 142 So. 501; *Dalton v. State*, 141 Miss. 841, 105 So. 784; *Musselwhite v. State*, 212 Miss. 526, 54 So.2d 911.

"For like reasons, we are unable to say that the trial court abused its discretion; and we, therefore, hold that no reversible error was committed in overruling the application for a change of venue or in overruling the motion to quash the indictment on the ground of ill-will or prejudgment of the case." *Golden v. State*, 220 Miss. 564, 71 So.2d 476, held to the same effect.

Gallego v. State, 222 Miss. 719, 77 So.2d 321, 327, held: "The trial judge was fair and impartial, and he saw to it that no juror served on the panel who had any doubt in regard to being able to disregard what he had read about the case, and try the defendant on the testimony given from the witness stand. The district attorney, although developing the testimony and prosecuting the case with conspicuous ability, was exceedingly fair, and took no undue advantage of the accused, either in the presentation of the evidence or his argument to the jury. It is conceded in the briefs of counsel that he and the sheriff of the county raised a fund for the expense necessary to enable the defendant's mother to come from Hawthorne, California, to Pascagoula, Mississippi, to testify as to the life story of the accused on the question of whether he was sane or insane, she and the accused being without means to otherwise defray the expense of her transportation.

"On the application for a change of venue, it is a matter of common knowledge that when such an application is granted the case is transferred to another nearby county for trial, since the county where the crime is committed is to bear the expense of the attendance of State's witnesses and of the entire trial elsewhere. The newspapers hereinbefore mentioned have a general circulation in the adjoining counties, except that the circulation of the local newspapers referred to as being published in Jackson County would probably have been confined largely to that county; and therefore the news items complained of as appearing in the other newspapers heretofore mentioned would naturally have been read by the general public in each of the nearby counties in regard to such a wilful, brutal, remorseless, and callous murder of a peace officer as was detailed in such news items under the conspicuous headlines of the papers wherein they were published."

Affirmed.

TRIAL PROCEDURE Habeas Corpus—California

Application of John MURAVIOV for a Writ of Habeas Corpus.

District Court of Appeal, Second District, Division 3, California, May 26, 1961, 13 Cal. Rptr. 466.

SUMMARY: A man who was unable to speak or understand English sought a writ of habeas corpus in a California district court of appeal. Petitioner had been convicted of non-support of minor children in a California municipal court and the conviction was affirmed by the Appellate Department of the Superior Court, Los Angeles. At that trial petitioner had not been represented by counsel nor provided with an interpreter. He then sought a writ of habeas corpus, arguing that, because of his inability to understand either the proceedings against him or his right to be represented by counsel, he had been deprived of due process of law. The district court of appeal refused to release petitioner from custody, but instead ordered a retrial, holding that his constitutional rights had been violated, and that habeas corpus was the appropriate remedy to protect the rights.

PER CURIAM

Petitioner, John Muraviov, was convicted of a violation of Penal Code, § 270 (wilful omission to furnish necessary support for minor child), and he was sentenced by the Municipal Court of the Los Angeles Judicial District to serve a term of 180 days imprisonment in the county jail therefor. Subsequently said judgment of conviction was affirmed on appeal by the Appellate Department of the Superior Court, Los Angeles.

Thereafter this court granted a writ of habeas corpus upon Muraviov's petition which alleged in essence that Muraviov was unable to speak or understand English, that he was not represented by counsel at the arraignment or at the trial, that no interpreter was present at either the arraignment or the trial, and that, by reason of all of said matters, petitioner was denied due process of law and that his constitutional rights were violated. Further proceedings in the municipal court were ordered stayed until further order of this court or final determination of this proceeding.

Return to the writ was thereafter made; hearing held before this court; and the matter was ordered submitted.

Examination of the entire record before us compels the conclusion that petitioner was not accorded due process of law; that his constitutional and statutory right to be represented by counsel was violated; that, therefore, his conviction was void and that the cause should be sent back to the municipal court for retrial in accordance with the views expressed in this opinion.

The allegations of petition for writ and sup-

porting declaration, as well as our observation and interrogation of petitioner at the hearing before us, sufficiently establish that petitioner does not speak nor understand English, that he did not with intelligent understanding waive his right to assistance of counsel, that he was not represented by counsel (and that he did not have the aid of an interpreter) at the arraignment or at the trial.

There can be no doubt that due process of law and a defendant's constitutional rights are violated where the defendant's ignorance or inability to intelligently understand his legal and constitutional rights render it impossible for him to understand the nature of the proceedings being taken against him or to make an intelligent and competent waiver of counsel. *People v. Chesser*, 29 Cal.2d 815, see pages 821-822 of said opinion and cases cited therat, 178 P.2d 761, at pages 764, 765.

It is established also that a defendant is entitled to counsel in any criminal action (unless he has waived his right thereto with intelligent understanding); and that habeas corpus is the appropriate remedy to protect and enforce such constitutional right by directing that the cause be retried. *In re McCoy*, 32 Cal.2d 73, 76-77, 194 P.2d 531; *In re James*, 38 Cal.2d 302, 313-314, 240 P.2d 596; cf. *McNeal v. Culver*, 365 U.S. 109, 81 S.Ct. 413, 5 L.Ed.2d 445; Cal.Const. art. I, § 13; Pen.Code, § 686.

The return first shows that the register of actions recites that, when petitioner was arraigned, he was informed of the charge against him "and of his legal rights." It next appears from the record that, when the cause came on later for trial the trial court merely asked defendant

four questions to which defendant gave monosyllabic "yes" and "no" answers. One of said questions was: "Do you understand and speak English?" to which question the defendant answered, "Yes."

On the bare face of the record, this might be regarded as evidence establishing that petitioner understood and spoke English, and it undoubtedly afforded a basis for the appellate department's holding on the appeal that "[t]here is evidence to sustain the trial judge's determination that appellant understood and spoke English." However, it should be obvious that, if petitioner was unable to understand or speak English, his monosyllabic "yes" and "no" answers had no meaning.

A further examination of the record shows that petitioner did not offer any defense; that he did not testify nor cross-examine; that the trial court notwithstanding failed to inform petitioner of his right to counsel upon the trial or the sentencing, and that the trial court made no inquiries to elicit whether petitioner was waiving right to counsel with intelligent understanding. See *People v. Chesser*, supra, 29 Cal.2d 815, 821-822, 178 P.2d 761.

Additionally, the trial court made no finding nor determination that petitioner understood and spoke English until nearly a month after the trial,

judgment of conviction and sentence. Said determination was made in connection with the denial of a motion of defendant for an order requiring the county to pay for reporter's transcript on appeal.

The function of habeas corpus is more sweeping than direct attack by appeal; and, where it appears as it does herein that due process and petitioner's constitutional rights were denied even though the judgment of conviction is apparently valid on its bare face, this court has the duty of seeing to it that an unfair trial in violation of constitutional rights be set aside and that the cause be sent back for retrial affording opportunity to the defendant to be represented by counsel and to have the aid of an interpreter. 24 Cal.Jur.2d 445, 564-565; *In re McCoy*, supra, 32 Cal.2d 73, 194 P.2d 531; *McNeal v. Culver*, supra, 365 U.S. 109, 81 S.Ct. 413 5 L.Ed.2d 445.

Under the circumstances herein, petitioner however is not entitled to have the charge against him dismissed and to be released from constructive custody. *In re McCoy*, supra, *In re James*, supra, 38 Cal.2d 302, 240 P.2d 596. It is, therefore, ordered that petitioner be remanded to the municipal court for retrial with opportunity to defendant to be represented by counsel and to have the aid of an interpreter. Pen.Code, § 1484.

TRIAL PROCEDURE

Juries—Arkansas

Luther BAILEY v. Lee HENSLEE, Superintendent of Arkansas State Penitentiary.

United States Court of Appeals, Eighth Circuit, March 17, 1961, Rehearing Denied May 4, 1961, 287 F.2d 936.

SUMMARY: A Negro, convicted in 1956 of rape in an Arkansas state court in Pulaski County, appealed to the state supreme court, contending that the trial judge erred in refusing to quash the jury panel because of the alleged systematic exclusion of Negroes. The court found no evidence of such exclusion and affirmed the conviction. 2 Race Rel. L. Rep. 997 (1957); *cert. denied*, 355 U.S. 851, 2 Race Rel. L. Rep. 1097 (1957). After extensive litigation during which the case twice reached the United States Supreme Court (see 3 Race Rel. L. Rep. 758 and 868, 4 Race Rel. L. Rep. 170 and 850; 5 Race Rel. L. Rep. 226), the accused for a second time petitioned the federal district court for habeas corpus, on the grounds that the jury commissioners had during the 1956 term and from 1938 through March, 1960, systematically limited Negroes in selecting jury panel members for the criminal division of the court wherein he was tried, that no Negro jury commissioner had ever been appointed

by a judge of that court, that there had been systematic exclusion of Negroes to serve on the jury panel for the civil divisions of that court, and that petitioner's Fourteenth Amendment rights were thereby violated. The federal court stated that the precise question before it was whether there had been discrimination in the jury panel which tried and convicted the petitioner, and held that the evidence did not make out a prima facie case of discrimination. 5 Race Rel. L. Rep. 846 (1960). On appeal, the Court of Appeals for the Eighth Circuit reversed and remanded. The court found that there had been from one to three Negroes on the regular petit jury panel in each term of the criminal division of the Pulaski County circuit court since 1952 and therefore that there had been no exclusion of Negroes from that panel in that period. However, considerable evidence was noted pointing to systematic exclusion of Negroes on panels in the civil divisions of that court and in the criminal division's panel of alternate and special panels; and it was further pointed out that poll tax receipts in the county were given racial marks and the jury commissioners, except perhaps for two terms, identified the names of Negroes on the lists by racial designations. From these and other cited facts, the court concluded that "a prima facie case of limitation of members of the Negro race in the selection of this defendant's petit jury panel was established, that the State did not rebut it, and that the District Court's conclusion to the contrary was clearly erroneous." The district court was directed to grant a stay of execution pending retrial, and to enter a dismissal of defendant's present petition for habeas corpus if he is retried, but to grant the petition if he is not retried within 9 months from the date of the instant opinion.

Before VOGEL and BLACKMUN, Circuit Judges, and DAVIES, District Judge.

BLACKMUN, Circuit Judge.

On January 18, 1960, the Supreme Court of the United States, in *Bailey v. Henslee*, 361 U.S. 945, 80 S.Ct. 408, 4 L.Ed.2d 364, entered the following order:

"Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied without prejudice to a further application for writ of habeas corpus in the appropriate United States District Court, on the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panels, in violation of the Federal Constitution."

Pursuant to this suggestion Luther Bailey, who is the defendant-prisoner concerned and who is now confined in the Arkansas State Penitentiary, petitioned the United States District Court for the Eastern District of Arkansas for a writ of habeas corpus. He based his case on the issue specified by the Supreme Court. After a hearing and the introduction of evidence his petition was denied. *Bailey v. Henslee*, D.C.E.D.Ark., 184 F.Supp. 298. Judges of this court granted the certificate of probable cause required by 28 U.S.C.A. § 2253 and the appeal is now before us.

Bailey, an adult Negro, was charged by in-

formation and convicted by an all-white petit jury in September 1956 (the March 1956 term) in the Circuit Court, First Division, Pulaski County, Arkansas, of the crime of rape (as defined in §§ 41-3401 and 41-3402 of Arkansas Statutes, 1947) committed in Little Rock on June 14, 1956. The jury did not render a verdict of life imprisonment in the state penitentiary at hard labor, as it had the right to do under §§ 41-3403 and 43-2153 and therefore, in line with the interpretation consistently given § 43-2153 by the Supreme Court of Arkansas,¹ Bailey was sentenced to death.² Since his conviction and sentence, his case has found its way several times into the appellate courts. We set forth in the margin, for background, its step-by-step progress.³

1. *Kelley v. State*, 133 Ark. 261, 202 S.W. 49, 54; *Clark v. State*, 169 Ark. 717, 729, 270 S.W. 849, 853-854; *Smith v. State*, 205 Ark. 1075, 172 S.W.2d 248, 249; *Turner v. State*, 224 Ark. 505, 275 S.W. 2d 24, 31.

2. No date for execution has presently been fixed pursuant to § 43-2623.

3. (a) The first state court appeal. Bailey took an appeal from the judgment of conviction. Errors alleged concerned the sufficiency of the evidence, the denial of procedural motions, the reception and exclusion of evidence, and instructions. Most of these are matters not for our present concern. One assignment, however, had to do with the court's alleged error in overruling Bailey's motion "to quash the regular panel and the special panel of the petit jury"; another related to the court's alleged error "in not allowing the Jury Commissioners, for the

We emphasize, initially, that the question of Bailey's guilt is not now before us.⁴ This is a situation where, as the United States Supreme Court once described the posture of another Arkansas case, " . . . what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved." *Moore v. Dempsey*, 261 U.S. 86, 87-88, 43 S.Ct. 265, 67 L.Ed. 543.

While the three of us who have heard the present appeal would naturally be hesitant and

March term 1952 to the March term 1956 inclusive, to testify."

The Arkansas Supreme Court upheld the refusal to permit testimony from the jury commissioners because (1) they "had not been subpoenaed . . . and were not present", and (2) no offer of proof had been made. It apparently also upheld the denial of the motion to quash because it regarded the deputy clerk's testimony, which was received, as, contrary to the defense's argument, not sufficient to show racial discrimination. All other issues were decided adversely to Bailey and the judgment was affirmed. Two justices would have granted a rehearing on a lesser offense instruction issue. *Bailey v. State*, 227 Ark. 889, 302 S.W.2d 796. Certiorari was denied by the United States Supreme Court. *Bailey v. State of Arkansas*, 355 U.S. 851, 78 S.Ct. 77, 2 L.Ed.2d 59.

(b) The second state court proceeding and appeal. Bailey then filed in the state court a petition for a writ of habeas corpus. He alleged denial of compulsory process as to the jury commissioners, in violation of the Arkansas (Article 2, § 10) and the United States (14th Amendment) Constitutions, and systematic limitation of Negroes in the selection of petit juries in the court where he was tried. This petition was amended, however, so that it recited that it was brought under Act 419 of the 1957 Acts of Arkansas (the Uniform Post-Conviction Procedure Act, codified as §§ 43-3101 to 43-3110 of the Arkansas Statutes and later repealed by Act 227 of the 1959 Acts of Arkansas) and that his conviction was void or voidable in that he was denied the right of compulsory process. This revision evidently contained no reference to the issue of systematic limitation of Negroes in the selection of petit jury panels. At the hearing it was shown that prior to the trial the defense had requested the clerk of court to issue subpoenas for the jury commissioners and that the court had refused to allow the clerk to do this. The petition was denied. The Arkansas Supreme Court affirmed on the grounds (1) that the 1957 Act authorized a proceeding to set aside a sentence if "the alleged error has not been previously and finally litigated or waived" and (2) that under the circumstances of the case the compulsory process issue either had been finally litigated on the first appeal or had been waived. *Bailey v. State*, 229 Ark. 74, 313 S.W.2d 388. Again certiorari was denied by the United States Supreme Court but this time "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." *Bailey v. State of Arkansas*, 358 U.S. 869, 79 S.Ct. 101, 3 L.Ed.2d 101.

(c) The first federal court proceeding and appeal. Pursuant to this suggestion by the Supreme Court, Bailey filed his second petition for a writ of habeas

disinclined to differ with conclusions reached by the panel (on which one of us sat) of this court which heard the first federal appeal in the case, *Bailey v. Henslee*, 8 Cir., 264 F.2d 744, and while we agree that the posture of that appeal and the record then before the court clearly called for the affirmance of the District Court's denial of the second petition for a writ of habeas corpus, and for the reasons set forth in that opinion, we are now confronted with the Supreme Court's order of January 18, 1960. We regard that order as a directive authorizing not only a new petition by this defendant but, as well, his making of a new record on the single issue now presented. The record has been made at the hearing and upon the evidence presented to Judge Young on the third and present application for the writ. We must base the conclusion we are now to reach on this new record unencumbered by limitations and shortcomings, if any, which may have characterized

corpus. This one was presented to the United States District Court for the Eastern District of Arkansas. He alleged violation of his Fourteenth Amendment rights in the trial court's denial of compulsory process. Apparently in this federal proceeding itself there was no request for compulsory process, no witnesses appeared and no offer of proof was made. Judge Henley found that there had been a denial of such process by the state court but nevertheless denied the petition for the writ. He did so on the grounds that a state prisoner, under 28 U.S.C.A. § 2254, must first exhaust his available state remedies; that this required him to present to the Supreme Court of Arkansas on the first appeal his contention that there was error in the denial of his request for compulsory process; that this issue had not been litigated on the first state appeal and therefore had been waived; and that the attempt to raise the question under the 1957 Act procedure did not constitute an exhaustion of state remedies. *Bailey v. Henslee*, D.C.E.D.Ark., 168 F.Supp. 314. An appeal was taken to this court on the grounds of deprivation of due process, nonwaiver, and exhaustion of state remedies. This court, by a unanimous panel, affirmed and held that if there was error in the state court's refusal to have the jury commissioners subpoenaed, that was a matter for proper appeal to the State Supreme Court; that an application for habeas corpus cannot serve as an appeal; and that, not having urged the alleged error on appeal, it was waived and constituted a failure to exhaust state remedies. *Bailey v. Henslee*, 8 Cir., 264 F. 2d 744. It was by way of response to the defendant's ensuing petition for certiorari (his third) from that action of this court that the order set forth in full at the beginning of this opinion was issued.

4. The evidence is set forth in the first opinion of the Supreme Court of Arkansas, *Bailey v. State*, supra, 227 Ark. 889, 302 S.W.2d 796, and no purpose would be served, even if it were pertinent, in repeating it here. This court has already observed, "The evidence of guilt is without substantial dispute". *Bailey v. Henslee*, supra, at page 746 of 264 F.2d.

the prior record in this long continued litigation. We also regard the Supreme Court's order as a directive requiring us to proceed to the merits of the issue apart from any procedural considerations, such as exhaustion of state remedies, or other concern for orderly administration of criminal justice which thus far seem to have defeated this particular defendant.

Arkansas Statutes, 1947, as amended, provide the method of choosing jury commissioners and jurors.⁵ This statutory procedure, of course, is followed in Pulaski County. The Circuit Court has a term in that county each September and March. § 22-310. As a matter of local practice, the Court there operates in three divisions. The First Division is concerned exclusively with criminal cases. The Second and Third Divisions are concerned with civil cases. Each division has its own jury commissioners and the juries selected by each set of commissioners operate only in the particular division. One exception to this division practice took place during the March 1956 term (the one at which the defendant was convicted) when 17 jurors were transferred from the Third Division to the First

Division in connection with the trial of Emmett Earl Leggett;⁶ afterward they were returned to the Third Division and were not used again in the First Division. This transfer had nothing to do with Bailey's case. Between 1939 and 1956 any juror who was selected for service in either the Second or the Third Division was legally qualified to serve in the First Division.

Most of the pertinent facts having to do with Negro representation on the Pulaski County panels are set forth in the opinion below at 184 F.Supp. 298, as well as in this court's first opinion in 264 F.2d 744, and these facts need not be reviewed in detail here. We mention only that there has been Negro representation, at least since 1952, on the regular panels of the First Division; that there has been no (or, at the most, one) instance of Negro representation on the alternate panels; that there is no positive evidence of any Negro representation on the special panels; that since 1939 no Negro has served on any panel in the Second and Third Divisions; and that there has been, to an extent at least, some designation of race in the jury records. Bailey's Exhibit 1, to which reference is made in Judge Young's Table at page 301 of 184 F.Supp., also covers the 4 years from September 1956 through March 1960 and would show race representation for the court terms held during that period. Specifically, that exhibit (which the parties stipulated sets forth facts to which the present Deputy Clerk would have testified if called) shows the presence of from one to three Negroes on the regular panel in each of these later terms, the identity of all Negroes who have served since 1952, and the absence of any Negro's name among the alternates.⁷

5. A poll tax receipt is necessary to qualify a person as an elector. § 3-104.2. The circuit court selects 3 qualified commissioners at each term. § 39-201. The commissioners select from the electors of the county or its subdivision not less than 24 nor more than 36 "persons of good character, of approved integrity, sound judgment and reasonable information," to serve as petit jurors at the next term and, when ordered by the court, additional persons, so qualified and not exceeding 12 in number, as alternate petit jurors; these are set forth in *separate* lists which are certified, sealed and delivered to the judge who in turn delivers them to the clerk. §§ 39-208, 39-206 and 39-209. Within the 30 days preceding the next term, the clerk opens these lists and delivers copies of them to the sheriff who summons the persons named to attend the term. § 39-210. At the term a petit jury panel of 24 or 36, as the court may direct, is formed from the lists of jurors and alternates. § 39-215. The court also directs the commissioners to provide a list of not less than 25 names in addition to the regular panel and alternates for the use of the court in cases when the regular panel may be exhausted in impaneling any jury. §§ 39-220 and 39-220.1. This list is also sealed and is opened when the court determines that a panel cannot be completed from the list of regular and alternate jurors or that it will be exhausted. § 39-221. If it becomes evident that the special panel should be supplemented the court may recall the jury commissioners to perform this task. § 39-221.1. A person who has served on a regular panel of the petit jury is ineligible (with certain exceptions not pertinent here) to serve again for a period of 2 years. § 39-225. A prospective juror may be challenged for cause. § 39-228. Peremptory challenges are provided for, both as to civil cases, § 39-229, and as to criminal cases, §§ 43-1921 and 43-1922.

6. See *Leggett v. State*, 227 Ark. 393, 299 S.W.2d 59.

7. We recognize that the parties are not in accord as to the propriety of jury selection evidence here for the period after the March 1956 term. (While the State objected to the post-March 1956 data, the court reserved ruling on that objection; the record itself discloses the making of no formal ruling thereafter. Judge Young's Table does not embrace this data.) There is no question of the propriety of this kind of evidence for a suitable period before that term to the extent it bears upon the alleged plan of exclusion or limitation. *Patton v. State of Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, and other cases cited in Footnote 10, *infra*. We are not here concerned with the question whether intent as a factor in crime is properly proved by evidence of prior acts of a kindred character. See, for example, *Kansas City Star Company v. United States*, 8 Cir., 240 F.2d 643, 650-651, certiorari denied 354 U.S. 923, 77 S.Ct. 1381, 1 L.Ed.2d 1438. Instead, we are here concerned with a pattern of jury selection which bears upon constitutional aspects of a criminal

So much for the facts. In turning to the legal aspects of the case, we feel that a preliminary review of established principles is in order:

The right of a defendant in a criminal prosecution to a trial "by impartial jury" is guaranteed by Article 2, Section 10, of the Constitution of the State of Arkansas.⁸ When a right to a jury trial exists,⁹ then, as was emphasized many years ago by the United States Supreme Court, a jury's proper composition is fundamental:

"(T)he constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Strauder v. West Virginia*, 1879, 100 U.S. 303, 308, 25 L.Ed. 664.

Strauder and a long line of succeeding Supreme Court cases hold that discrimination on the basis of race or ancestry in the selection of persons for service on grand or petit jury panels is violative of the equal protection clause of the Fourteenth Amendment.¹⁰ A federal statute

trial. We feel that it is not improper for us to consider, for what it is worth, any evidence which, coupled and consistent with that as to prior terms, tends to show a pattern in jury selection. This we think, is demanded by the nature and possible result of this particular case, namely, the constitutionality of jury selection and the capital punishment which may befall the defendant.

8. *Anderson v. State*, 200 Ark. 516, 139 S.W.2d 396, 398; *Lane v. State*, 168 Ark. 528, 270 S.W. 974, 975.
9. The Fourteenth Amendment, of course, does not compel a state to provide trial by jury. *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674; *Palko v. State of Connecticut*, 302 U.S. 319, 324, 58 S.Ct. 149, 82 L.Ed. 288; *Fay v. People of State of New York*, 332 U.S. 261, 288, 67 S.Ct. 1613, 91 L.Ed. 2043.
10. *Neal v. Delaware*, 103 U.S. 370, 394, 397, 26 L.Ed. 567; *Bush v. Commonwealth of Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354; *Gibson v. State of Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075; *Carter v. State of Texas*, 177 U.S. 442, 447, 20 S.Ct. 687, 44 L.Ed. 839; *Rogers v. State of Alabama*, 192 U.S. 226, 231, 24 S.Ct. 257, 48 L.Ed. 417; *Martin v. State of Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497; *Norris v. State of Alabama*, 294 U.S. 587, 589, 55 S.Ct. 579, 79 L.Ed. 1074; *Hollins v. State of Oklahoma*, 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500; *Hale v. Commonwealth of Kentucky*, 303 U.S. 613, 616, 58 S.Ct. 753, 82 L.Ed. 1050; *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; *Smith v. State of Texas*, 311 U.S. 128, 129-130, 61 S.Ct. 164, 85 L.Ed. 84; *Hill v. State of Texas*, 316 U.S. 400, 62

supplements this rule. 18 U.S.C.A. § 243. This does not mean, however, that a jury must have proportional representation of races in order to assure the equal protection of the laws. *State of Virginia v. Rives*, 100 U.S. 313, 322-323, 25 L.Ed. 667; *Akins v. State of Texas*, 325 U.S. 398, 403, 65 S.Ct. 1276, 89 L.Ed. 1692. Proportional racial limitation as such is forbidden. *Cassell v. State of Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 94 L.Ed. 839. A defendant has no right even to have his race represented on his jury.¹¹

"What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury as well as in the empanelling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color." *Martin v. State of Texas*, 200 U.S. 316, 321, 26 S.Ct. 338, 339, 50 L.Ed. 497.

Furthermore, inequality or disproportion in the number finally selected does not in itself show discrimination. *Akins v. State of Texas*, supra, at page 403 of 325 U.S., at page 1279 of 65 S.Ct. Discrimination in a jury's selection must of

S.Ct. 1159, 86 L.Ed. 1559; *Akins v. State of Texas*, 325 U.S. 398, 400, 65 S.Ct. 1276, 89 L.Ed. 1692; *Patton v. State of Mississippi*, supra, at page 465 of 332 U.S., at page 185 of 68 S.Ct.; *Brunson v. State of North Carolina*, 333 U.S. 851, 68 S.Ct. 634, 92 L.Ed. 1132; *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839; *Ross v. State of Texas*, 341 U.S. 918, 71 S.Ct. 742, 95 L.Ed. 1352; *Brown v. Allen*, 344 U.S. 443, 470, 73 S.Ct. 397, 97 L.Ed. 469; *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; *Hernandez v. State of Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866; *Reece v. State of Georgia*, 350 U.S. 85, 87, 76 S.Ct. 167, 100 L.Ed. 77; *Eubanks v. State of Louisiana*, 356 U.S. 584, 585, 78 S.Ct. 970, 2 L.Ed.2d 991; See *Caruthers v. Reed*, 8 Cir., 102 F.2d 933, 939, certiorari denied 307 U.S. 643, 59 S.Ct. 1047, 83 L.Ed. 1523; Note *Anderson v. State*, 40 Ala.App. 509, 120 So.2d 397, certiorari denied 270 Ala. 575, 120 So. 2d 414, certiorari granted 364 U.S. 877, 81 S.Ct. 165, 5 L.Ed.2d 100.

There have also been suggestions that it is violative of due process. *United States ex rel. Goldsby v. Harpole*, 5 Cir., 263 F.2d 71, 81, certiorari denied 361 U.S. 838, 850, 80 S.Ct. 58, 4 L.Ed.2d 78; *Wong Yim v. United States*, 9 Cir., 118 F.2d 667, 669, certiorari denied 313 U.S. 589, 61 S.Ct. 1112, 85 L.Ed. 1544; See *Fay v. People of State of New York*, supra, at page 284 of 332 U.S. at page 1625 of 67 S.Ct., note 27; *Hall v. United States*, 83 U.S. App.D.C. 166, 168 F.2d 161, 164, 4 A.L.R.2d 1193, certiorari denied 334 U.S. 853, 68 S.Ct. 1509, 92 L.Ed. 1775.

11. *Neal v. Delaware*, supra at page 394 of 103 U.S.; *Bush v. Commonwealth of Kentucky*, supra, at page 117 of 107 U.S. at page 631 of 1 S.Ct.; *Akins v. State of Texas*, supra, at page 403 of 325 U.S., at page 1279 of 65 S.Ct.

course be proved; it is not to be presumed. *Tarrance v. State of Florida*, 188 U.S. 519, 520, 23 S.Ct. 402, 47 L.Ed. 572. The burden of establishing the discrimination is upon the defendant. *Akins v. State of Texas*, supra, at page 400 of 325 U.S., at page 1277 of 65 S.Ct. He may, however, establish a prima facie case of discrimination of this kind and, if he does, the burden then passes to the state to refute the discrimination. Evidence that Negroes have never served on a jury in the county or parish has been held to make a prima facie case.¹² Such a case is established where race differentiating tickets are used to identify jurors and no Negro is selected in a panel of 60. *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244. The presence on the panel of a few Negroes who would probably be disqualified does not constitute sufficient rebuttal of the prima facie case. *Reece v. State of Georgia*, supra, at page 88 of 350 U.S., at page 169 of 76 S.Ct. Testimony of non-discrimination expressed in generalities is not sufficient to rebut.¹³ Discriminatory selection in prior years does not nullify a present conviction if the selection of the jury for the current term is on a proper basis. "Former errors cannot invalidate future trials." *Brown v. Allen*, 344 U.S. 443, 479, 73 S.Ct. 397, 418, 97 L.Ed. 469.¹⁴

A state's restriction in the selection of jurors to males, freeholders, citizens, persons within certain ages, or those having educational qualifications, has been held not to violate the Fourteenth Amendment. *Neal v. Delaware*, 103 U.S. 370, 386, 26 L.Ed. 567; *Gibson v. State of Mississippi*, 162 U.S. 565, 580, 16 S.Ct. 904, 40 L.Ed. 1075. A restriction to those whose names

appear on the tax list has been similarly upheld. *Brown v. Allen*, supra, at page 474 of 344 U.S., at page 416 of 73 S.Ct.

In avoiding racial discrimination in the selection of jurors it is not enough for the jury commissioners or any other selecting agency to be content with persons of their personal acquaintance. *Smith v. State of Texas*, 311 U.S. 128, 132, 61 S.Ct. 164, 85 L.Ed. 84; *Hill v. State of Texas*, 316 U.S. 400, 404, 62 S.Ct. 1159, 86 L.Ed. 1559. It is "their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color." *Cassell v. State of Texas*, supra, at page 289 of 339 U.S., at page 633 of 70 S.Ct.

Although the question whether racial discrimination exists has been said to be a question of fact, this does not relieve a federal court of the duty to make independent inquiry and to determine whether a federal right has been denied.¹⁵

The Supreme Court of Arkansas itself has recognized these principles and has done so both in opinions affirming convictions against the challenge of unconstitutionality and in opinions reversing.¹⁶

Our task here is to apply these principles to the facts before us. We should note, however, what we are not now concerned with: (1) There is no contention here that the Arkansas Con-

12. *Neal v. Delaware*, supra, at page 397 of 103 U.S.; *Norris v. State of Alabama*, supra, at page 591 of 294 U.S., at page 580 of 55 S.Ct.; *Pierre v. State of Louisiana*, supra, at page 361 of 306 U.S., at page 540 of 59 S.Ct.; *Hill v. State of Texas*, at page 404 of 316 U.S., at page 1161 of 62 S.Ct.; *Patton v. State of Mississippi*, at page 466 of 332 U.S., at page 186 of 68 S.Ct.; *United States ex rel. Goldsby v. Harpole*, supra, at pages 77-78 of 263 F.2d. See *Hernandez v. State of Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.
13. *Norris v. State of Alabama*, supra, at page 598 of 294 U.S. at page 583, of 55 S.Ct.; *Hernandez v. State of Texas*, supra, at pages 481-482 of 347 U.S. at pages 671-672 of 74 S.Ct.; *Reece v. State of Georgia*, at page 88 of 350 U.S., at page 169 of 76 S.Ct.; *Eubanks v. State of Louisiana*, supra, at page 587 of 356 U.S., at page 973 of 78 S.Ct.
14. See also *Washington v. State*, 213 Ark. 218, 210 S.W.2d 307, 309, certiorari denied 335 U.S. 884, 69 S.Ct. 232, 93 L.Ed. 423; *Green v. State*, 222 Ark. 222, 258 S.W.2d 56, 59; *Moore v. State*, 229 Ark. 335, 315 S.W.2d 907, 911, certiorari denied 358 U.S. 946, 79 S.Ct. 356, 3 L.Ed.2d 353.

15. *Norris v. State of Alabama*, supra, at pages 589-590 of 294 U.S., at page 580 of 55 S.Ct.; *Pierre v. State of Louisiana*, supra, at page 358 of 306 U.S., at page 538 of 59 S.Ct.; *Smith v. State of Texas*, supra, at page 130 of 311 U.S., at page 165 of 61 S.Ct.; *Akins v. State of Texas*, supra, at page 402 of 325 U.S., at page 1278 of 65 S.Ct.; *Patton v. State of Mississippi*, supra, at page 466 of 332 U.S., at page 186 of 68 S.Ct.; *Cassell v. State of Texas*, supra, at page 283 of 339 U.S., at page 629 of 70 S.Ct.; *Avery v. State of Georgia*, supra, at page 561 of 345 U.S., at page 892 of 73 S.Ct.; *Naupe v. State of Illinois*, 360 U.S. 264, 272, 79 S.Ct. 1173, 3 L.Ed.2d 1217.
16. Affirming: *Smith v. State*, 218 Ark. 725, 238 S.W.2d 649, 653; *Washington v. State*, supra, at page 310 of 210 S.W.2d; *Dorsey v. State*, 219 Ark. 101, 240 S.W.2d 30, certiorari denied 342 U.S. 851, 72 S.Ct. 80, 96 L.Ed. 642; *Moore v. State*, supra, at pages 910-912 of 315 S.W.2d; *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312, 317-318, reversed on other grounds, 356 U.S. 560, 568-569, 78 S.Ct. 844, 2 L.Ed.2d 975; *Williams v. State*, 229 Ark. 1022, 322 S.W.2d 86, 90. Cf. *Brown v. State*, 213 Ark. 989, 214 S.W.2d 240, and *Eastling v. State*, 69 Ark. 189, 62 S.W. 584. Reversing: *Castleberry v. State*, 69 Ark. 346, 63 S.W. 670; *Ware v. State*, 146 Ark. 321, 225 S.W. 626, 631; *Bone v. State*, 198 Ark. 519, 129 S.W.2d 240, 244; *Haraway v. State*, 202 Ark. 845, 153 S.W.2d 161, 163; *Maxwell v. State*, 217 Ark. 691, 232 S.W.2d 982; *Green v. State*, supra, at page 58 of 258 S.W.2d.

stitution or statutes themselves authorize any discrimination on account of race in the selection of jurors. (2) There is no contention here that the statutory provision that jurors be "persons of good character, of approved integrity, sound judgment and reasonable information" is improper. (3) There is no complaint here resting on the fact that the charge against the defendant was by information rather than by indictment.¹⁷ (4) There appears to be no contention on this appeal that the stipulated fact that since 1938 no Negro has ever been a jury commissioner in Pulaski County is itself unconstitutional discrimination.¹⁸ (5) There is no contention here that the use of peremptory challenges to eliminate representatives of a defendant's race is improper.¹⁹ (6) And there is no contention here that the Pulaski County three division system itself, with its separate sets of jury commissioners and panels, is invalid.

While the cited authorities establishing the general principles which govern here are numerous, four of the Supreme Court decisions afford special guidance for this case:

1. *Norris v. State of Alabama*, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074. The jury commissioners, through their clerk, prepared a preliminary list of all males between stated ages as prescribed by statute. However, the designation "col." was placed after the names of Negroes on the list. The final grand jury roll was compiled from this list. There was testimony, which the court found acceptable and not overcome, that there were Negroes in the county qualified to serve. No Negro, however, had been called for many years. Similar practices appeared with respect to the selection of the petit jury in another county where the trial took place. The court held that testimony of non-discrimination by way

of generalities was not sufficient to overcome the "strong prima facie case". The Negro defendant's rape conviction was reversed.

2. *Smith v. State of Texas*, supra, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84. Over 3,000 Negroes of the county met the qualifications prescribed by the state statutes for grand jury service. In a 7-year period, however, only 5 of 384 grand jurors who served were Negroes. Of the persons called for grand jury duty only 18 were Negroes and of these the names of 13 appeared last on the 16 man lists; the custom was to select the first 12 on the list. Of the 5 called who were not given No. 16, 4 were placed between Nos. 13 and 16 and one was No. 6. One of the 5 Negroes who served did so 3 times so only 3 individual Negroes served at all during the 7-year period. The court held that chance and accident alone could not have brought about a listing of so few or been responsible for the numbering circumstances surrounding the names. The Negro defendant's rape conviction was reversed.

3. *Avery v. State of Georgia*, supra, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244. Jury commissioners selected prospective jurors from county tax returns. The names of white persons so selected were printed on white tickets and the names of Negroes on yellow tickets. A drawing was then made from a jury box. The tickets drawn were handed to a sheriff. He gave them to a clerk who arranged the tickets and typed up the final list of persons to serve. The judge who picked out the tickets testified that he practiced no discrimination. However, no Negro was selected to serve on a panel of 60. It was conceded that Negroes were available for jury service. The Negro defendant's rape conviction was reversed. Mr. Justice Frankfurter, in concurring, said, at page 564 of 345 U.S., at page 894 of 73 S.Ct.:

" * * * (O)ppportunity for working of a discriminatory system exists whenever the mechanism for jury selection has a component part, such as the slips here, that differentiates between white and colored; such a mechanism certainly cannot be countenanced when a discriminatory result is reached. The stark resulting phenomenon here was that somehow or other, despite the fact that over 5% of the slips were yellow, no Negro got onto the panel of 60 jurors from which Avery's jury was selected. The mind of justice, not merely its eyes, would

17. See *Hurtado v. People of State of California*, 110 U.S. 516, 538, 4 S.Ct. 111, 292, 28 L.Ed. 232; *Gaines v. State of Washington*, 277 U.S. 81, 86, 48 S.Ct. 468, 72 L.Ed. 793; *Moore v. Henslee*, 8 Cir., 276 F.2d 876, 878.

18. In any event this point has been decided by this court adversely to the defense in the recent case of *Moore v. Henslee*, supra, at page 879 of 276 F.2d, and we adhere to that holding. See also *Maxwell v. State*, supra, 217 Ark. 691, 232 S.W.2d 982, 983, and *Payne v. State*, supra, 226 Ark. 910, 295 S.W.2d 312, 317. We do not regard the incidental references to jury commissioners (as well as to grand and petit jurors) in *Hernandez v. Texas*, supra, at pages 476 and 481 of 347 U.S., at pages 669 and 671 of 74 S.Ct. as indicative of a contrary attitude on the part of the Supreme court.

19. See *Hall v. United States*, supra, at page 164 of 168 F.2d.

have to be blind to attribute such an occurrence to mere fortuity."²⁰

4. *Eubanks v. State of Louisiana*, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991. A jury commission made up a grand jury list of not less than 750 persons meeting the qualifications prescribed by the state statutes. Twice each year the commissioners drew the names of 75 persons from that group. This smaller list was then submitted to one of the criminal court judges who chose a new grand jury of 12 every six months. Some of these judges interviewed prospective jurors; others made the selection on the basis of personal knowledge or reputation. However, the evidence showed that only one Negro had been picked for grand jury duty within memory; that this one instance apparently resulted from a mistaken impression that he was white; that Negroes comprised about one-third of the population of the parish; that there was a substantial number of qualified Negroes; that since 1936 Negroes were included on each list submitted to the judges; and that for the following 18 years only the single Negro was chosen. The Negro defendant's murder conviction was reversed.

In the light of these decisions, this case may be a close one. On the one hand, there is no dispute that, whatever may have been the pre-1953 situation, there has been representation of the Negro race on the regular petit jury panel in each of the terms which have come and gone in the Pulaski County Circuit Court, First Division, from March 1953 through March 1960. The actual number of Negroes has varied from one to three.²¹ There were at least 31 instances of a Negro juror on the regular panel of the 15 terms during the 7½ year period. One Negro may also have been named among the alternates for the September 1954 term. Obviously, then, there has been no exclusion, systematic, studied or otherwise, of Negroes from regular jury panels in the criminal division since 1952.

On the other hand, the record discloses the presence of the following:

1. Since 1939 no Negro has ever served on

20. See, also *Brown v. Allen*, supra, at page 480 of 344 U.S., at page 419 of 73 S.Ct., and *Williams v. State of Georgia*, 349 U.S. 375, 382, 75 S.Ct. 814, 99 L.Ed. 1161.

21. While there is some disagreement in the evidence as to the exact Negro representation on certain of the panels under review, we agree with Judge Young's observation, at page 301 of 184 F.Supp., that the discrepancies are probably more apparent than real.

any kind of panel, regular, alternate or special, in the Second or Third Divisions of the Pulaski County Circuit Court. A fact of this kind, as has been noted above, would support a conclusion that a prima facie case of discrimination in the selection of juries in these civil divisions has been established.

2. The First Division's panels of alternates, from 1952 to 1960, with one possible exception, contained no Negro name. Here again it can be said that this fact creates an un rebutted prima facie case of discrimination in the selection of these alternates.

3. The 5 special panels assembled for the March 1956 term in the First Division, which contained an aggregate of approximately 450 names, included according to the stipulated Exhibit 1, the name of no Negro.²²

4. Fourteen of the persons on the defendant's own petit jury panel of 37 names came from those 2 special panels consisting exclusively of white persons. In a not dissimilar situation the Supreme Court of Arkansas has said:

"The State contends, and not without attention-compelling force, that commingling of the original thirteen jurors with the panel containing Negroes gave to the defendant in principle the identical opportunity he was contending for: that is, the right to select twelve names from a list partially composed of members of his race. The answer is that we are dealing primarily with the Constitution as distinguished from a particular defendant. * * * But there is no doubt that the local system of jury selection resulted in systematic exclusion of Negroes in violation of the Fourteenth Amendment, * * *

"Our own cases, and decisions by the Supreme Court of the United States, are too clear for

22. There is some indication that certain of these special panel lists were not opened. It is clear, however, that 2 were opened, that these contained about 199 names, and that the name of no Negro was included. This substantial number of special panel jurors was not occasioned by the Bailey litigation but by the Leggett murder case noted above. Leggett was white and we are not concerned here with any problem of his constitutional rights in jury selection. See *Haraway v. State*, 203 Ark. 912, 159 S.W.2d 733, certiorari denied 317 U.S. 648, 63 S.Ct. 42, 87 L.Ed. 521; *Fay v. People of State of New York*, supra, at page 287 of 332 U.S. at page 1627 of 67 S.Ct.; *Griffin v. State*, 183 Ga. 775, 190 S.E. 2, 4; *State v. Lea*, 228 La. 724, 84 So.2d 169, 171, certiorari denied 350 U.S. 1007, 76 S.Ct. 655, 100 L.Ed. 869; *State v. Dierlamm*, 189 La. 544, 180 So. 135, 136; *Nanfito v. United States*, 8 Cir., 20 F.2d 376, 378.

misunderstanding." *Maxwell v. State*, 217 Ark. 691, 232 S.W.2d 982, 983.

5. Over the years presented no more than 3 Negroes appeared in any regular panel of 24 persons. At the most (6 of 15 times) therefore, Negroes have represented one-eighth of the total. This is a little less than what the evidence seems to show, at least for 1954 and 1955, to be the proportion between the races for persons holding the qualifying poll tax receipts.²³ We recognize, of course, that mere lack of identity in proportions is not in itself unconstitutional.²⁴

6. There is an unexplained and seemingly unusual amount of repetition of the names of Negroes which do appear on the regular panels from 1953 to 1960 and which in the aggregate made up the 31 instances. A. E. Nabors, who was named in September 1955, was named again in September 1957 and in March 1960. D. B. Lacefield, who was named in September 1955, was also named in March 1958 and March 1960 (he had been named, too, in March 1951). Simon Herron, who was named in March 1956, was also named in September 1958. W. E. Hayes, who was named in September 1955, was named again in March 1959. I. S. McClinton, who was named in March 1957, was also named in September 1959 (he had been named, too, in March 1951). Vilma T. Nabors, who was named in September 1956, was the wife of A. E. Nabors. The 31 names for the 1953-60 period thus come down to only 24 different persons and 2 of these are husband and wife.²⁵

7. The Pulaski County poll tax receipts were given racial marks. They contained a "C" when the holders were known to be colored and a "W" when they were known to be white. Where race was unknown, as was often the case when payment of the tax was made by mail, they were marked "W".²⁶

23. See 8 Cir., 264 F.2d 744, 745. There is some testimony to the effect that the stated percentage figures between whites and Negroes is little more than "a pure and simple guess."

24. *State of Virginia v. Rives*, supra, at pages 322-323 of 100 U.S.; *Akins v. State of Texas*, supra, at page 403 of 325 U.S., at page 1279 of 59 S.Ct.

25. For the period prior to the term during which the defendant was convicted repetition of a Negro's name apparently occurred only once.

26. As to this the County Tax Collector testified:

"We do not feel that a colored person, in the majority of instances, would feel offended if they got back a poll tax marked 'W', where on the other hand, it is completely re-

versed, if a white person would get back a poll tax receipt through the mail marked 'colored', they would have a great resentment."

8. The jury commissioners, except, perhaps, for two terms, themselves identified names of Negroes on the lists by the designation "(C)" or "(Col)" or "(Colored)". Why this was done does not appear. There is testimony, as is usually the situation in these cases, that this was of no persuasion so far as the jury commissioners were concerned.

9. The testimony of the jury commissioners as to their efforts to ascertain the names of qualified Negroes leaves much to be desired.²⁷

The foregoing facts, taken in the aggregate, lead us to the conclusion that a prima facie case of limitation of members of the Negro race in the selection of this defendant's petit jury panel was established, that the State did not rebut it, and that the District Court's conclusion to the contrary was clearly erroneous. Here there appears to be a definite pattern of race selection; here there is a device for race identification with its possibility of abuse; here there is exclusion from the alternate panels and from the special panels actually used; here there is an element of recurrence of the same Negro names; and here there is the additional factor, for

27. The following appears with respect to Commissioner McArthur:

"Q. (Mr. Williams, resuming) How many Negroes do you know in Pulaski County? A. I really couldn't say. I've lived here off and on all my life, thirty-eight years, and I'd say I know as much as anyone else in this court-room, maybe more."

"Q. My question was whether or not there was any effort made to acquaint yourself with Negro poll tax holders, any special effort outside of the deliberation? A. My answer would be no. If they were on the list of qualified electors, they were qualified as far as we were concerned, white or colored."

"Q. You made no special effort? A. No special effort."

As to Commissioner Cavin, the following took place:

"Q. Mr. Cavin, was there any special effort made on your part to acquaint yourself with Negro poll tax holders in Pulaski County? A. No. I feel like I know as many colored people in Pulaski County as any other white person, probably more."

With respect to Commissioner Davis, the following took place:

"Q. Mr. Davis, you did not make any special effort to see that Negroes were represented on this jury panel, did you? A. No special effort either way."

"Q. You didn't make any special effort? A. Either way."

"The Court: 'Either way'—I (don't) think I know what you mean, Mr. Davis. Will you explain that—A. I didn't make any effort to put them on or to not put them on."

what atmosphere it may provide, of exclusion from the civil divisions' panels.

Our determination that the procedure followed in the defendant's trial does not measure up to the standards of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, as interpreted by the Supreme Court, does not mean that he need go free. The State of Arkansas is at liberty to try him again upon the same information by procedure which meets constitutional requirements. That this may result in further time consuming proceedings, both trial and appellate, before there can be an end to Bailey's case, is, of course, regrettable. Long delays in the attainment of an ultimate decision "may show a basic weakness in our government system",²⁸ may present "a sorry chapter",²⁹ and may be exasperating at times. Nevertheless, it is to the credit and not to the shame of our system that, no matter what the alleged crime may be, a defendant in this nation will receive a trial conducted with the safeguards guaranteed by our fundamental law. The Fifth Circuit recently said: "The very heinousness of the crime and the weight of the physical evidence made it all the more necessary that the defendant's constitutional rights be not lightly or unadvisedly surrendered". *United States v. Harpole*, 5 Cir., 263 F.2d 71, 83, certiorari denied 361 U.S. 838, 850, 80 S.Ct. 58, 4 L.Ed.2d 78. Mr. Chief Justice Stone summarized the situation in *Hill v. State of Texas*, supra, at page 406 of 316 U.S., at page 1162 of 62 S.Ct.:

"A prisoner whose conviction is reversed by this Court need not go free if he is in fact

guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements. But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty * * *. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. * * * Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."

The State of Arkansas is entitled to a reasonable time within which to retry this defendant for the crime charged against him. Pending a retrial by the State, the District Court is directed to grant a stay of execution. If he is retried, the Court is directed to enter a dismissal of Bailey's present petition for release on habeas corpus. If he is not retried within nine months from the filing date of this opinion, the District Court is directed to grant Bailey's petition for a writ of habeas corpus.

The judgment appealed from is reversed and the case is remanded for further proceedings consistent with this opinion.

28. See *Chessman v. Dickson*, 9 Cir., 1960, 275 F.2d 604, 607.

29. See *Chessman v. Teets*, 354 U.S. 156, 164, 77 S.Ct. 1127, 1132, 1 L.Ed.2d 1253.

TRIAL PROCEDURE Juries—Arkansas

Maceo BINNS, Jr. v. STATE of Arkansas.

Supreme Court of Arkansas, March 13, 1961, 344 S.W.2d 841

SUMMARY: A Negro convicted in an Arkansas state court of having wilfully damaged a building with dynamite appealed, contending that there had been racial discrimination in the

selection of the jury commissioners and the jury panel. Having previously rejected such a contention in a similar situation in *Payne v. State*, 5 Race Rel. L. Rep. 217 (1960), the court adhered to precedent in overruling the argument here. The case was reversed and remanded on other grounds. An excerpt from the opinion on the jury is printed below.

JOHNSON, Justice.

This is an appeal from a conviction for having willfully damaged a building with dynamite in violation of Section 41-4237, Ark. Stats. (1947).

The appellant asserted seven alleged errors in his motion for a new trial. In his brief in this Court he argues only one of these matters which is the alleged error of the Court in refusing to set aside the jury panel and to appoint new jury commissioners to select a new jury. Ap-

pellant, a Negro, contends that the panel should have been set aside and new commissioners appointed because Negroes have been systematically excluded from the office of jury commissioner for a period of many years and no member of the jury commission which selected the panel which tried appellant was a Negro. This same contention has been previously rejected in *Payne v. State*, 226 Ark. 910, 295 S.W.2d 312; and we refuse to depart from the holding of that case.

TRIAL PROCEDURE

Juries—Arkansas

Edgar A. LAUDERDALE, Sr. v. STATE of Arkansas, et al., etc.

Supreme Court of Arkansas, February 13, 1961, 343 S.W.2d. 422.

SUMMARY: Defendant was convicted of being an accessory before the fact in the dynamiting of the Little Rock school board building during a time when the board was concerned with problems of school desegregation. On *voir dire*, defendant attempted to ask prospective jurors: "Are you a segregationist or an integrationist?" The court refused to allow the question. After conviction, defendant appealed, contending that this was an improper restriction on the right to examine jurors. The supreme court of Arkansas affirmed the trial court, holding that examination of jurors on *voir dire* should be limited to questions which are pertinent for testing capacity and competency. The question offered, the court said, "would have no bearing on his fairness as a juror to sit in the trial of a case being tried for dynamiting a building. This is particularly true in this case since the words 'integrationist' and 'segregationist' are now relative terms, and convey meanings of a scope and degree of intensity of feelings as to be more confusing than helpful in determining the fitness of a juror." The court also rejected contentions that a change of venue and challenges as to the fitness of two jurors should have been granted. Three justices dissented.

McFADDIN, Justice.

Appellant was charged with injuring property with dynamite—a violation of § 41-4237, Ark. Stats. The information stated: "The said E. A. Lauderdale, Sr., on or about the 7th day of September A.D. 1959, did unlawfully and feloniously, and willfully damage and injure a building located at 800 Louisiana Street in the City of Little Rock, by means of dynamite, against the peace and dignity of the State of Arkansas." Although appellant was charged with damaging

the school building at Eighth and Louisiana, it was not claimed that he personally set off the dynamite; rather, the claim was, that he was an accessory before the fact with his accomplice, J. D. Sims, who, personally and in keeping with the directions of Lauderdale, set off the charge of dynamite. An accessory before the fact may be tried and convicted as a principal. Section 41-118, Ark. Stats.; *Wilkerson v. State*, 209 Ark. 138, 189 S.W.2d 800. J. D. Sims confessed to the crime and received sentence and then testified for the State in the trial against Lauderdale.

The trial resulted in a jury verdict of guilty; and from a judgment on the verdict there is this appeal. The transcript contains more than a thousand typewritten pages; the combined abstract and briefs in this Court contain 537 printed pages; and the motion for new trial contains 55 assignments. We discuss some of these:

I. *Change Of Venue.* Appellant claimed that because of other dynamitings, because of widespread newspaper, television, and radio publicity, and because the Little Rock Chamber of Commerce offered a reward for the conviction of the dynamiters, it was impossible for him to obtain a fair trial in Pulaski County. The motion for change of venue stated in part: "Within a matter of less than a week after the commission of the said crimes, public opinion in Pulaski County became firmly fixed against your petitioner, and the minds of the inhabitants of Pulaski County are now so prejudiced against petitioner that a fair and impartial trial cannot be had in Pulaski County, Arkansas, in this matter."

Both appellant and the State called witnesses in regard to the change of venue; a total of twenty-three testified; and at the conclusion of the hearing the Circuit Court denied the motion. We cannot say that the Trial Court abused its discretion. In *Perry [and Coggins] v. State*, Ark., 342 S.W.2d 95, there was discussed this matter of the change of venue of two other parties involved in other dynamitings that occurred the same night. In that case, the Trial Court also denied the motion for change of venue and we sustained the ruling: what we said in that opinion on the change of venue matter applies with equal force to the case at bar.

II. *Refusal To Allow Interrogation Of Veniremen On Certain Matters.* A large number of veniremen were examined before the jury was finally completed. In the course of the *voir dire* examination the defendant's attorney asked many questions, some relating to membership in the Country Club of Little Rock, the Capitol Citizens' Council, the Little Rock Chamber of Commerce, and also membership in churches and other organizations. The defendant undertook to ask the veniremen, "Are you a segregationist or an integrationist?" The Court refused to allow any veniremen to be asked such question; and the correctness of that ruling is the point here at issue. The appellant says that he

had a right to ask the veniremen, "as to whether they believed in integration, the mixing of the races, or segregation"; and appellant cites *Bethel v. State*, 162 Ark. 76, 257 S.W. 740, 31 A.L.R. 402, wherein we held it was proper on *voir dire* to ask veniremen if they belonged to the Ku Klux Klan. When relevant and of significance to the case being tried, inquiry should be allowed to be made on *voir dire* as to membership in an organization. The examination of the prospective juror is for the purpose of obtaining a fair and impartial jury, each member of which has a mind free and clear of all interest, bias, or prejudice that might prevent the finding of a true and just verdict. In 31 Am.Jur. 121 "Jury" § 139, the rationale of the holdings is summarized in this language:

"A wide latitude is allowed counsel in examining jurors on their *voir dire*. The scope of inquiry is best governed by a wise and liberal discretion of the Court, but the adverse litigant should be given the right to inquire freely about the interest, direct or indirect, of the proposed juror that may affect his final decision. Thus reasonable latitude should be given parties in the examination of jurors to gain knowledge of their mental attitude toward the issues to be tried. * * *

The same authority then continues:

"However, as a general rule, the examination of jurors on *voir dire* should be restricted to questions which are pertinent and proper for testing the capacity and competency of the juror * * * and must not go so far beyond the parties and the issues directly involved that it is likely to create a bias, a prejudice, or an unfair attitude toward any litigant."¹

To ask a venireman on *voir dire* whether he was a segregationist or an integrationist would have no bearing on his fairness as a juror to sit in the trial of a case being tried for dynamiting a building. This is particularly true in this case since the words, "integrationist" and "segregationist" are now relative terms, and convey meanings of a scope and degree of intensity of feelings as to be more confusing than helpful in determining the fitness of a juror. To compel the veniremen to answer questions on these

1. See also 50 C.J.S. Juries § 275, p. 1041. A clear statement of the law is also to be found in *Webb v. Commonwealth*, Ky., 314 S.W.2d 543.

points would have been to inject an issue not pertinent to testing the capacity and competency of the jurors and would have tended to create a bias or prejudice that would also have embarrassed the veniremen. The Judge of the Trial Court is vested with wide discretion in determining the extent to which inquiry may be made of veniremen; and, by seeing the trial, can determine first hand—far better than we can on appeal—whether the questions asked are in good faith or are for the purpose of creating bias and prejudice. We cannot say that the Trial Judge abused his discretion in the case at bar.

III. *The Juror Smith.* The appellant claims that the Trial Court committed error with respect to this juror (a) in preventing appellant from further interrogation of the juror on *voir dire*, and (b) in refusing to excuse the juror because of the answers he made on *voir dire*. However, we find no error committed by the Court in either of these matters. Several pages in the transcript contain the *voir dire* examination of the juror and the Court's rulings. It was not shown that Mr. Smith had discussed the case with any witness; but he did state that he had an opinion in the case. The Court then asked him the following:

"Q. You can and will set this preconceived opinion aside and go in the jury box with an open mind and try this case solely on the law and the evidence developed here and give both sides a fair and impartial trial?"

"A. That's correct."

In response to inquiries by appellant, the juror stated that he would have to hear evidence to feel that his original opinion was erroneous; and again the Court asked the juror:

"Q. You could set that opinion aside and try this case solely on the law and the evidence developed here?"

"A. Yes, your Honor."

The appellant desired to further interrogate the juror as to whether it would take evidence to remove his opinion, but the Court then ruled that the inquiry had been pursued far enough, and that the juror would not be excused for cause. The appellant had exhausted his peremptory challenges at this point.

The situation presented to the Trial Court was similar to the situation in many of our reported

cases. In *Rowe v. State*, 224 Ark. 671, 275 S.W.2d 887, 888, this Court said:

"While it is true that some of the veniremen said that they had formed tentative opinions based upon newspaper reports or what some one had told them, all who were accepted stated that they could and would be guided solely by the testimony, giving to the defendant the benefit of all doubts that the law defines. There was no error in accepting these men. It is no longer practicable in an intelligent society to select jurors from a psychological vacuum or from a stratum where information common to the community as a whole is lacking."

In *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244, Chief Justice Waite used this language, which is appropos:

"The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case."

In *Niven v. State*, 190 Ark. 514, 80 S.W.2d 644, 645, Mr. Justice McHaney said:

"Our rule is that a juror is not disqualified in a criminal case where he has a 'fixed' opinion which is based upon hearsay testimony, newspaper reports, or mere rumor, even though it would take evidence to remove such opinion, where he states on his *voir dire* that he can and will, if selected, go into the jury box and disregard such opinion, and that he has no bias or prejudice for or against the accused. *Jackson v. State*, 103 Ark. 21, 145 S.W. 559; *Corley v. State*, 162 Ark. 178, 257 S.W. 750; *Tisdale v.*

State, 120 Ark. 470, 179 S.W. 650; Scruggs v. State, 131 Ark. 320, 198 S.W. 694; Crawford v. State, 132 Ark. 518, 201 S.W. 784; Mallory v. State, 141 Ark. 496, 217 S.W. 482; Sneed v. State, 143 Ark. 178, 219 S.W. 1019; Borland v. State, 158 Ark. 37, 249 S.W. 591; Maroney v. State, 177 Ark. 355, 6 S.W.2d 299. The above cases also hold that the qualifications of a juror rest very largely in the sound discretion of the trial court."

The trial court did not abuse its discretion in the ruling regarding the juror Smith.

IV. *Admission Of Other Dynamitings.* Appellant was tried for participation in the dynamiting of the Little Rock School Board Office. J. D. Sims had confessed to participating in this dynamiting and he testified for the State; also Jesse Raymond Perry had been tried and convicted for participating in this dynamiting, and he testified against appellant. Furthermore, it was shown that the dynamiting of the Little Rock School Board Office was a part of a scheme planned by appellant Lauderdale with Sims, Perry, Coggins, and Samuel Graydon Beavers, to dynamite several places the same night the School Board building was dynamited. Appellant claims that error was committed in allowing the testimony as to other dynamiting the same night. He relies very strongly on our holding in Alford v. State, 223 Ark. 330, 266 S.W.2d 804, 808, in which this language appears:

"Thus our cases very plainly support the common-sense conclusion that proof of other offenses is competent when it actually sheds light on the defendant's intent; otherwise it must be excluded."

See also Rhea v. State, 226 Ark. 664, 291 S.W.2d 521.

We hold that the testimony as to the other dynamitings planned for the same night was clearly admissible to show the scheme, pattern, and intent of Lauderdale in the dynamiting²

2. As regards evidence of other dynamitings the Court instructed the jury as follows:

"You are instructed that evidence introduced by the State in this case, of similar offenses and a planned similar offense which was to occur prior to the offense charged in the information, was admitted solely for the purpose of showing the defendant's intent, if any; motive, if any; guilty knowledge, if any; and his part in a common scheme, if any and you may consider it for this purpose and this purpose only. You may consider such evidence then only if you find beyond a reasonable doubt

in the case of the Little Rock School Board Office for which he was tried. In the appeal of Perry [and Coggins] v. State, Ark., 342 S.W.2d 95, 99 we ruled on this question, involving the same dynamiting incident as herein involved, and we quoted from Underhill On Criminal Evidence, 5th Ed., § 207, as follows:

"If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense, which is itself a detail of the whole criminal scheme."

V. *Sufficiency Of The Corroboration.* Section 43-2116, Ark.Stats. reads in part:

"A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. * * *"

The appellant insists that there was not sufficient evidence to take the case to the jury—says appellant—because the testimony of the accomplices was not sufficiently corroborated by other evidence tending to connect Lauderdale with the commission of the offense. The evidence of the accomplices in this case is sufficient to support the jury verdict *if there be other testimony independent of the testimony of the accomplices that tends to connect defendant with the commission of the crime.*³ We therefore have examined the

that similar offenses occurred or another similar offense had been planned and that the defendant participated in the alleged common design. The defendant is not on trial for any offense except the offense charged in the information."

3. Some of our cases on corroboration of accomplices presenting a jury question are Miller v. State, 155 Ark. 68, 243 S.W. 1063; Knight and Johnson v. State, 228 Ark. 502, 308 S.W.2d 821; Underwood v. State, 205 Ark. 864, 171 S.W.2d 304; and Vaughn v. State, 58 Ark. 353, 24 S.W. 885. At the request of the defendant, the Court instructed the jury as follows: "You were told that under the law of the State of Arkansas, the defendant, E. A. Lauderdale, cannot be convicted upon the testimony of the accomplices, J. D. Sims, Jessie Perry, and Samuel Graydon Beavers, unless you find that the testimony of said accomplices is corroborated by other evidence tending to connect Ed Lauderdale with the

record for such "other testimony"; and here is some of it:

(1) It was testified by the witness Rucker that about 6:30 P.M. on the night of Monday, September 7, 1959 (the night of the dynamiting) he was burning trash and heard a car door slam a short distance away; that he investigated and found the appellant Lauderdale, who said he had been getting leaf mold; and that after a brief conversation about their families, Lauderdale drove away. The witness Rucker testified that Lauderdale was alone and sitting in the car, and that it was parked in a clean place where there was no leaf mold. Three days after the bombing, officers went with Rucker to the place where he had seen Lauderdale; and a cache of dynamite was found 150 feet from where Lauderdale's car had been parked. It was shown by other witnesses that this cache consisted of 65 sticks of dynamite, and a coil fuse over 19 feet long—all in a sack under a pile of rusted metal.

(2) It was testified by Sammy Beavers, son of Samuel Graydon Beavers, that appellant Lauderdale visited at the home of Samuel Graydon Beavers and had a 15-minute conversation with Samuel Graydon Beavers (one of the accomplices) outside of the hearing of any person, on Friday night before the Labor Day bombings on the following Monday. Lauderdale came at six o'clock in the evening and professed to be in a hurry, but he took Samuel Graydon Beavers (the accomplice) out on the front porch and they talked from 15 to 30 minutes, with no one hearing the conversation.

(3) The accomplice Beavers testified that he obtained dynamite and fuse from Lauderdale to use in bombing another place in Little Rock, but the witness changed his mind and decided it was too dangerous; so he took the dynamite and fuse home and buried them. He took the officers to the place where he had buried the items; and the officers testified that the dynamite and fuse that Beavers had were similar to some of the dynamite and fuse that had been uncovered in the cache previously mentioned.

(4) The witness Crawley testified that she was the owner and operator of the King Tut Cafe on Asher Avenue, and that about 7:30 P.M.

commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In other words, the rule is that the evidence, independent of that of the accomplice, must tend to connect the defendant with the commission of the crime."

on Labor Day, September 7, 1959, Sims drove up to her cafe with another man seated on the front seat with him and with Lauderdale on the back seat. She waited on the three men and brought them three cups of coffee and one package of cigarettes. This testimony put Lauderdale with Sims three hours before the dynamiting.

(5) It was testified by two FBI agents that the fingerprint of appellant was found on the car of Perry, the accomplice. This testimony put Lauderdale and Perry together in a car some time before the bombing.

(6) Perry and Sims claimed that they met Lauderdale at 13th and Pine Streets one evening to make the plans for the bombing. The law enforcement officers testified that Lauderdale admitted to them that he was at 13th and Pine on the same evening that Perry and Sims claimed to have met him there.

The testimony of some of these witnesses was disputed, but the weighing of the testimony was for the jury; and our problem is, whether these six numbered items constitute "other evidence tending to connect the defendant with the commission of the offense," independent of the testimony of the accomplices. One of these items if standing alone would not be sufficient; two of them might not be sufficient; but when all six of these items are put together, we hold that they are sufficient "other evidence tending to connect the defendant with the commission of the offense", independent of the testimony of the accomplices. Together they make a chain of circumstances that carry the case to the jury. One thread, in itself, is very weak, but many threads woven together will make a rope; and these threads of independent evidence, woven together, are sufficient to take the case to the jury.

VI. *The Juror Illing.* The trial of this case commenced in Circuit Court on November 23, 1959, and the jury verdict was returned late in the night of November 27, 1959. On the afternoon of November 27th, just as the defense was presenting its last witness before resting the case, the following occurred at the instance of the defendant in the absence of the jury:

"Mr. Howard: If Your Honor, please, since the jury was selected and sworn, there has come to the attention of counsel for the defendant that one of the jurors, Mr. Horace Illing, is related by affinity to Fire Chief

Nalley, whose automobile was the subject of testimony in this law suit, and it being our information, and it is purely information, that Fire Chief Nalley married the sister of Horace Illing, and we ask the Court to declare a mistrial at this time.

"The Court: That is what I understand. I learned that yesterday. Overruled.

"The defendant objected to the above ruling of the court and at the time asked that his exceptions be noted of record, which was accordingly done."

Appellant claims that the Court's ruling was erroneous and that the Court should have declared a mistrial because of Juror Illing's relationship to the wife of Fire Chief Nalley. We do not agree with the appellant's claim; and there are several reasons for our conclusion.

In the first place, there was no statutory reason for excusing the juror Illing. Section 43-1920 Ark.Stats., in listing the grounds for challenging a juror for implied bias, says in part:

"First. Where the juror is related by consanguinity, or affinity, or stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or is a member of the family of defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted."

Illing could not have been disqualified under this section because Lauderdale was being tried only for dynamiting the school office and not for dynamiting the automobile which the Little Rock Fire Department owned and had assigned to Fire Chief Nalley, who did not own the car and could have suffered no property damage in connection with the dynamiting of the car. Furthermore, Nalley was not even a witness⁴ in the trial of this case. The Trial Court possesses considerable discretion as to excusing jurors in a situation such as is here presented, and we cannot say that such discretion was abused.⁵

4. In *Jones v. State*, Ark., 320 S.W.2d 645, we held that a juror was not disqualified as a matter of law even when related to a witness in a case.

5. Appellant cited the Texas Appeals case of *Wright v. State*, 12 Tex.App. 163, decided in 1882. In that case it was held that a juror was disqualified because his family had a horse alleged to have been stolen by the defendant then on trial for stealing a horse from another party. No cases or authorities were cited to sustain the Court; and the holding is considerably weakened by the subsequent Texas case

Another reason for our conclusion to sustain the ruling of the Trial Court in regard to Juror Illing is because of the opportunity the appellant had on *voir dire* examination to interrogate Juror Illing. The *voir dire* examination of Illing consumed eight pages of the typewritten transcript (T. 408-415, inclusive). The juror was interrogated by the defendant at length, and that was the time and place for the defendant to ask him about any possible relationship to anyone in any wise the object of any bombing. Due diligence required investigation by the defendant on *voir dire* as to veniremen; and defendant could not wait until near the conclusion of the trial, then ask the Court for a mistrial, and complain that the Court abused its discretion. No "overruling necessity" was shown in this case, nor any absolute statutory disqualification or bias.

Conclusion. As aforesaid, the motion for a new trial contained fifty-five assignments. We have studied each one of them and find no reversible error.

Affirmed.

GEORGE ROSE SMITH, and ROBINSON and JOHNSON, JJ., dissent.

Dissent

ROBINSON, Justice (dissenting).

There are three serious errors in this case, any one of which calls for a reversal of the judgment if the appellant is not to be denied a fair and impartial trial. And, regardless of the nature of the crime charged, or whether he is guilty or innocent, under our Constitution and laws he is entitled to be tried by a fair and impartial jury. Ark. Const. of 1874, Art. 2, §§ 7-10. *Glasser v. U.S.* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

The errors mentioned are: (1) The refusal of the trial court to declare a mistrial after learning that Chief Gann Nalley's brother-in-law, Horace Illing, was a member of the jury; (2) the action

of *Rogers v. State*, 109 Tex.Cr.R. 88, 3 S.W.2d 455, 457, decided by the Texas Court of Criminal Appeals (the highest court in criminal cases) in 1927. In the *Rogers* case the Court held that a juror was not absolutely disqualified because of relationship to the prosecutrix, and then the Court said: "We find in many opinions expressions regarding disqualification of jurors, or incompetence of jurors, which are inaccurate to say the least." The Court also cited, *inter alia*, *Wright v. State*, 12 Tex.App. 163, and said: "Said cases present facts only partly similar to those before us, and, in so far as the opinions advanced the suggestion that jurors were incompetent or disqualified, same are not accurate."

of the trial court in refusing to allow defense counsel to question the veniremen on their voir dire examination as to their feelings with reference to integration or segregation of the races; (3) the action of the trial court in refusing to permit counsel for the defendant to question the venireman Smith as to how he arrived at an opinion as to the guilt or innocence of the defendant after it developed on his examination in chief that he did have such an opinion as would require evidence to remove.

We will deal with the errors in the order named. First, the refusal of the trial court to declare a mistrial after learning that a member of the jury was a brother-in-law to Chief of the Fire Department Nalley, whose automobile was destroyed with dynamite, which offense was so closely connected with the dynamiting of the school building that the two crimes constituted a part of the same transaction. The defendant was on trial for having participated in the bombing of a school building at 8th and Louisiana Streets in Little Rock. A short time before the bombing of the school building, Fire Chief Gann Nalley's automobile, furnished to him by the Fire Department, while parked at his home, was destroyed with dynamite. During the trial of the case the State was permitted to prove the bombing of Chief Nalley's car. In these circumstances it cannot be said that Chief Nalley and his wife would have been qualified jurors. Undoubtedly by reason of their close connection with the case, Nalley and his wife, Horace Illing's sister, would have been disqualified. In fact, they were disqualified by statute. Ark.Stats. § 43-1920 provides: "A challenge for implied bias may be taken: First. Where the juror is related by consanguinity, or affinity, or stands in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, employer and employed on wages, or is a member of the family of defendant or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted."

Here Chief Nalley and his wife, the juror's sister, were injured, at least in a nominal manner, by the offense proven in this case to convict the defendant. The dynamite was exploded in their yard, blowing up an automobile in the possession and control of Chief Nalley. Fortunately, he and his wife, the juror's sister, were not in the car at the time.

On the motion for a change of venue, numerous newspaper articles were introduced in evi-

dence, referring to the dynamiting of the car. It is stated in one of the local papers of September 12, 1959: "The charges accuse each of these three with two offenses: The dynamiting of Fire Chief Gann L. Nalley's city-owned station wagon, at Nalley's home Monday night, and the dynamiting of the Little Rock School Board office at Louisiana Street." Another article of September 9th states: "The police and the F.B.I. continued checking at the other two scenes of the bombing, the Baldwin Company at 322 Gaines Street, which houses the business office of Mayor Werner C. Knoop, and the home of Fire Chief Gann L. Nalley at 5221 Base Line Road, where a city-owned station wagon was blown up." An article of September 12th states: "Two charges were filed in circuit court against Lauderdale, Sims and Perry. They are accused of dynamiting Nalley's car and the school administration building." Another article of September 8th states that Lauderdale and Sims are charged with the school board building bombing at 800 Louisiana and the Fire Chief's vehicle. It can be assumed that Nalley complained of the dynamiting of his car. Hence, not only were he and his wife the injured parties within the meaning of the above mentioned statute, but they must have been two of the complaining parties. It will be recalled, now, that the defendant was on trial for dynamiting the school building. The State was permitted to prove the dynamiting of Nalley's car, and Nalley's wife's brother was on the jury.

Nalley and his wife were disqualified as jurors, and under the statute the wife's brother, the juror Illing, was also disqualified. He was closely related by consanguinity and affinity to the injured and complaining parties. The fact that it was not shown that Nalley and his wife went to the prosecuting attorney and filed a complaint is immaterial. In the circumstances they would be considered complaining parties within the meaning of the statute even if they had asked that the cases be dismissed. But even if Nalley and his wife should not be regarded as parties in the case at bar, they are parties in a similar case that would disqualify them in the present case. The courts have always been zealous to protect a party's right to a fair and impartial trial, and even where it was learned after a trial was completed that the trial judge was a distant relative of the wife of the deceased in a murder case, the defendant was granted a new trial on that ground alone. *Byler v. State*,

210 Ark. 790, 197 S.W.2d 748. If the trial judge is disqualified in a situation of that kind, a juror would be even more disqualified. A juror has much more to do with whether a defendant is convicted than does a trial judge. In the Byler case it was held that the murdered man's wife was a party to impartial jury. We are not without precedent in a situation of this kind. We have two cases directly in point. In *McDaniel v. State*, 228 Ark. 1122, 313 S.W.2d 77, this Court held that the trial court properly discharged a juror after the jury was sworn, because he was related to the defendant. Such relationship had not been discovered on the voir dire examination, and this Court did not indicate that the State waived such disqualification by reason of the failure to learn of the relationship earlier. The Court cited *Harris v. State*, 177 Ark. 186, 6 S.W.2d 34, where it was held that the trial court properly discharged a juror after evidence had been introduced in the case because the juror was on the defendant's bond. These cases show conclusively that the mere fact that the relationship was not discovered on the voir dire is no sound reason for not remedying the situation when the discovery is made.

To sustain the view expressed by the majority, only the case of *Jones v. State*, Ark., 320 S.W.2d 645, is cited, and that case is not in point. There a juror was discharged over the objection of the defendant. There was no contention that the juror was related by consanguinity or affinity to a member of the family of the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted. The juror in the *Jones* case was merely a sister to a policeman who was a witness for the State. If anyone had a right to object to the sister of the policeman serving as a juror, it would have been the defendant, and he made no objection whatever. In fact, he objected to the juror's being discharged.

Next is the matter of the trial court's refusing to permit counsel for defendant to question veniremen in regard to their feelings about integration of the schools. It is a matter of common knowledge that the dynamiting of the school building grew out of the integration of the schools controversy in Little Rock. In addition, the State introduced testimony to that effect. The State's witness, Sims, who blew up the Nalley car, testified that the dynamiting was done for the purpose of harassing the public and keeping the Negroes out of the white schools.

There are people who firmly believe that the schools should be integrated; on the other hand, others are firmly convinced that the schools should not be integrated. The situation in Little Rock has been such as to arouse the emotions of many people. Undoubtedly the dynamiting of the school building was calculated to prevent integration. In these circumstances the attorney for the defendant would want to know how a juror felt on the subject of integration. In all probability he would exercise a peremptory challenge on a venireman who strongly favored integration. But the court would not permit the veniremen to be questioned on how they felt on that subject. Again the majority have not cited a single authority that sustains the view expressed. The majority quote from 31 Am.Jur. 121. Instead of sustaining the majority, it is clear that the cited text is favorable to the contention made by appellant. As heretofore pointed out, it was of the utmost importance for defense counsel to know how the jurors felt on the integration question, but he was denied the right of getting this information from the veniremen. The majority state: "When relevant and of significance to the case being tried, inquiry should be allowed to be made on voir dire as to membership in an organization." But the majority do not follow this principle and do not point out in what way a venireman's convictions on the integration question would be immaterial when a person is charged with a very serious crime committed in an attempt to prevent integration, as provided by the State. In *Bethel v. State*, 162 Ark. 76, 257 S.W. 740, 743, 31 A.L.R. 402, Judge McCulloch said: " * * * an accused has a right, for the purpose of determining the extent to which he will avail himself of the statutory peremptory challenges, to inquire as to the membership of the proposed jurors in an organization 'where it is shown that there are reasons why membership in an organization might influence the parties to the litigation in the exercise of peremptory challenges,' and that 'the court ought to permit the inquiry to be made, if it appears to be made in good faith.'"

In the case at bar the State proved that the defendant committed a crime in an attempt to prevent integration of the schools. The defense attorney might have been extremely negligent if he had failed to attempt to learn how a venireman felt about integration. The situation is likened to a case where a person is charged with bootlegging liquor. Certainly defense counsel

should be permitted to inquire if a venireman is a prohibitionist. In the case of *Pendergrass v. State*, 121 Tex.Cr.R. 213, 48 S.W.2d 997, 998, the charge was "illegally transporting liquor," and, although the defendant did not make his record properly, the court said: "It would have been proper for appellant's counsel to elicit from each juror whether or not he was a prohibitionist, in order that he might intelligently exercise his peremptory challenges. [citing cases] The right to appear by counsel, guaranteed by the Bill of Rights, carries with it the right of counsel, within reasonable limits, to examine each juror individually in order to prepare himself for the intelligent exercise of the peremptory challenges allowed him by statute. [citing cases.]"

In 50 C.J.S. Juries § 275, p. 1043, it is said: "With the exception of such questions as the juror may be privileged from answering on the ground that the answer would tend to degrade or incriminate him * * * a juror may be fully examined and asked any questions which are pertinent to show the existence of bias or prejudice, and may be examined as to any bias with respect to the nature of the case or the subject matter of the litigation as well as with respect to the parties personally." And in 50 C.J.S. Juries § 273, p. 1036, it is said: "The right to a trial by a fair and impartial jury includes the right to have the jurors sworn and examined as to their qualifications, and it is error for the court to deny this right if properly requested before the jury is sworn. This right may be exercised by either party to a civil or criminal action, and it exists with respect to each particular case regardless of the fact that the same jurors have been examined in other cases. The purpose of voir dire examination is to determine whether a juror possesses necessary qualifications, whether he has prejudged the case, and whether his mind is free from prejudice or bias, so as to enable the party to ascertain whether a cause for challenge exists; and to ascertain whether it is expedient to exercise the right of peremptory challenge, * * *."

The next point is the refusal of the trial court to permit defense counsel to continue the examination of the venireman Smith after he had stated he had an opinion as to the guilt or innocence of the accused which would require evidence to remove. The majority state: "It was not shown that Smith had discussed the case with any witness." Neither does the record show that he had not discussed the case with witnesses.

Mr. Smith stated frankly and unequivocally that he had an opinion as to the guilt or innocence of the defendant and that it would take evidence to remove such opinion, but on further questioning by the court he stated that he could give the defendant a fair and impartial trial. The defense attorney then attempted to question Smith further about his opinion, but the court ruled that no further questions along that line would be permitted. The majority state that the court "ruled that * * * the juror would not be excused for cause," and then a long line of cases is cited to the effect that the mere fact a venireman has an opinion based on newspaper reports or rumor does not disqualify him. Appellant makes no contention that such is not the law, but appellant does say that when the venireman stated that he had an opinion based on what he had "seen, read and heard," he was prima facie disqualified and that he remained disqualified until it is shown by further questioning that what he had seen, read and heard was only newspaper items or rumors and that he had not actually been a witness to the commission of the crime and had not talked to witnesses who purported to know the facts in the case.

The State made no effort to show how Mr. Smith arrived at the opinion which he stated he had as to the merits of the case, and the defendant was not allowed to fully develop the facts on that point. The Court said, in *Sneed v. State*, 47 Ark. 180, 1 S.W. 68, 70: "The entertainment of preconceived notions about the merits of a criminal case renders a juror prima facie incompetent. But when it is shown that the impression is founded upon rumor, and not of a nature to influence his conduct, the disqualification is removed." To the same effect is *Hardin v. State*, 66 Ark. 53, 48 S.W. 904. In the case at bar the disqualification was never removed.

For the reasons stated herein, I respectfully dissent.

GEORGE ROSE SMITH, J., joins in that part of this dissent pertaining to the juror Illing.

JOHNSON, Justice (dissenting).

I agree with every word of Mr. Justice ROBINSON'S dissenting opinion in this case and in addition to the reasoning thereof I would also reverse because of the refusal of the trial court to grant defendant's Petition for Change of Venue.

I recognize that where a Petition for Change

of Venue is controverted by the State and controverting evidence is offered, it is a matter of the court's sound discretion as to whether the petition should be granted. *Leggett v. State*, 227 Ark. 393, 299 S.W.2d 59. On the other hand, this does not mean that the court may arbitrarily deny such a petition merely because it is controverted or merely because there is controverting evidence produced. I am firmly convinced that in denying this petition the trial court misconstrued the rule of the *Leggett* case, *supra*, and abused his discretion. Apparently, the trial court felt that the *Leggett* case held that if prospective jurors, examined before the petition is heard, do not disqualify, the petition should be denied. It should be noted that over the protest of the appellant, and before evidence was taken on his Petition for Change of Venue, the trial court had the Clerk call the 27 jurors left on the panel of 50 and the court asked three general questions of this group. These questions were whether any member of the panel knew of any reason why he should not serve on the jury in the case and whether what the members of the panel had seen, read and heard about the crime would prevent them from giving both the State and the defendant a fair and impartial trial. Some of the panel answered "No, sir" and the court asked one other question requesting any member of the jury who had his mind made up to so indicate. This question was not answered. As previously indicated, this was done over the protest of the appellant and when he did not have an opportunity to interrogate said jurors, even though he told the court that he had 40 or 50 questions to be addressed to every member of the panel. The court's erroneous misconception of the holding of the *Leggett* case becomes even more demonstrable by a reference to the record wherein the oral statement of the court denying defendant's Petition for Change of Venue is set forth verbatim. In denying this petition, the court made it abundantly clear that he based his ruling wholly and solely upon the answers of the jurors to the three questions heretofore set forth *and that he had not considered the evidence which was adduced in support of and in opposition to the Petition for Change of Venue*. I do not believe that the holding of the *Leggett* case may be so simplified. In the *Leggett* case, the Petition for Change of Venue was filed on the 3rd day of the trial supported by the affidavits and testimony of two witnesses. One of these witnesses knew little

about the sentiment in the county except that prevailing in two wards in Little Rock. It cannot be said that this made even a *prima facie* showing as it is necessary that at least two of the affiants or witnesses know the state of mind of the inhabitants of the whole county. *Brown v. State*, 134 Ark. 597, 203 S.W. 1031. The court held in the *Brown* case that if a witness was not acquainted with the sentiment over the county generally, the trial court was at liberty to find that he was not a "credible person" as required by the statute. Further, at the time of the hearing in the *Leggett* case, eleven jurors had already been chosen, and this Court said on appeal:

"Here the trial judge had listened for more than three days while hundreds of veniremen were searchingly examined under oath. In deciding whether the appellant's two witnesses had correctly estimated the local sentiment the court was entitled to consider the views of scores of citizens already heard. Although many veniremen had reached positive conclusions from what they had read or heard, there is no indication that the news reports were biased or represented a studied effort to inflame the public. *Meyer v. State*, 218 Ark. 440 236 S.W.2d. 996. Despite the defendant's theory that it was impossible to obtain a fair-minded jury within the county, the court was convinced by testimony heard at firsthand that this goal had almost been reached. In these circumstances the conclusion that the asserted prejudice did not exist lay well within the limits of the court's discretionary authority." [227 Ark. 393, 299 S.W.2d 60].

The facts in the case at bar and those in the *Leggett* case are completely different. Where the appellant *Leggett* did not have two "credible" witnesses on his petition, appellant here had three witnesses who met the test of the statute together with several others who corroborated these witnesses as to particular sections of the county. Appellant's three witnesses were the Hon. Dan Sprick, State Senator of Pulaski County, a former Mayor and Alderman of the City of Little Rock; Mr. Noble Strait, a competitor of the appellant; and Mr. R. C. Limerick, Jr. I will not take space to identify all of the supporting witnesses; suffice it to say, their testimony may be found in the record. There is another striking difference between the *Leggett* case and the case at bar in that the court said in the *Leggett* case that there appeared to be

no studied effort on the part of news reports to inflame the public. In this case, the trial judge himself said: "I will take judicial knowledge that the Gazette is a pro-integration newspaper." On the hearing on the petition, 93 news articles, pictures, cartoons and editorials from the two Little Rock newspapers were offered in evidence. I say that those articles, pictures, cartoons and editorials did represent "a studied effort to inflame the public". It cannot be said that cartoons on the editorial pages bearing such captions as "Wanted—Public Enemy No. 1"; "Triumph of Law and Order"; and "Tall in the Saddle" were not studied efforts to inflame the public against this appellant. There were editorials bearing such captions as "Fast Work in the Bombing Case" wherein it was asserted that the leaders moved with great speed and determination to "track down the guilty parties" and those who underwrote a reward fund of \$25,000 for arrest and conviction were commended; editorials captioned "The Performance of Little Rock's Finest" wherein the news organ commended "swift decisive work of the Little Rock Police and the Federal Bureau of Investigation" together with the diabolically clever suggestion (intended to warp the public's mind as to the burden of proof in a criminal case) to the effect that the defendants would receive a fair trial: "with ample opportunity to clear themselves if they are innocent"; editorials captioned "fog" suggesting that the defendants were communists and that they should be checked out on this score by the F. B. I.; and editorials captioned "An act of terror—and its roots" wherein it was suggested that the only redress for the damage done: "lies in what we now do—in our clear demonstrations that we will no longer tolerate apostles of discord, the preachers of dissention and the advocates of rebellion who have brought this shame upon our city." These cartoons and these editorials represented studied efforts to inflame the public and to preclude appellant from receiving a fair trial. The action of the Prosecuting Attorney in publicly stating that defendant's \$50,000 bond should not be reduced and that: "this defendant has largely forfeited his right in organized society" can hardly be viewed as an effort to assure to the appellant a fair trial by unbiased jurors. In fact, in *Sisson v. State*, 168 Ark. 783, 272 S.W. 674, it was held that where a sheriff had, in his campaign for election, made speeches over the county wherein he stated that he was going to send the de-

fendant "to hell or the penitentiary one, if he was elected sheriff" was such as to create prejudice in the minds of the inhabitants of the county against the defendant and furnished full justification for the belief of an affiant that the minds of the inhabitants of the county had been prejudiced against the appellant. The record shows that Mr. Holt was three times honored with the office of Prosecuting Attorney by the very people from whom prospective jurors would be selected. The actions of the Pulaski County Bar Association in adopting resolutions condemning participants in acts of terrorism and commending the law enforcement officers for their activities; contributing to the Chamber of Commerce reward fund and advising the law enforcement officers and the officials of the county that: "The Association, upon request, will assist in any way possible in the investigation of the said explosion or the prosecution of persons charged with responsibility therefor" where certainly not calculated to insure a fair trial to appellant. Lawyers are leaders in the community and when a whole county bar association arrays itself on the side of the prosecution before trial and without fee or hope of reward offers to prosecute the persons charged with the crimes, it cannot help but engrave an impression upon the minds of the public to the effect that those charged are guilty. When business and professional leaders in the community are quoted in the press as condemning the crimes in question, it cannot be said that such statements do not work grave damage to the cause of a defendant awaiting trial on such charges. When the President of the Little Rock Council of P.T.A. says: "I think the penalty should be a stiff, severe one"; such a statement cannot be said to be creating an atmosphere of sweetness and light for a trial of the charges. When the District Superintendent of the Methodist Church and the Episcopal Bishop of Arkansas condemn the acts in public news stories and the Bishop calls for: "A common effort to guard the safety of every man, woman and child who inhabits the city", how can it be said that these news stories would not work for the conviction of the defendant as surely as the testimony of an eye witness?

When it is shown that these statements of condemnation by community leaders were published in one newspaper with an average circulation of 45,683 in the county of venue and another newspaper with a circulation of 44,000 in the county of venue and it is further shown

that the same matters were given publicity by television and radio, I respectfully submit that such publicity cannot be said to have no effect upon the minds of prospective jurors. This was not an ordinary case where a juror may have read one or two newspaper articles. This was a situation where there had been incessant publicity from the very beginning. When the business manager of the Arkansas Gazette said: "We have run more than one editorial with respect to acts of terrorism and have even offered cartoons and we are quite proud of the orbit of accounts. We hope that people will form an opinion from what we say," it certainly cannot be said that the news reports, cartoon pictures, and editorials in that publication were not a studied effort to inflame the public. When the Chamber of Commerce can quickly raise \$25,000 to prosecute the persons charged with the crime,

it can hardly be said that the contributors to such fund are indifferent.

Regardless of the guilt or innocence of a person or persons being tried for the commission of a crime, basic concepts of our system of justice demand that every defendant receive a fair trial by a fair and impartial jury. I sincerely fear that the opinion of the majority in the case at bar holding that those things pointed out by Mr. Justice ROBINSON, and the results of the conduct of prominent persons and newspapers, as set out above, do not constitute error, has effectively deprived this defendant and by precedent all citizens of this State of the precious right of a fair trial by a fair and impartial jury. For these reasons I cannot conscientiously do less than dissent to the opinion of the majority with all the vigor at my command.

TRIAL PROCEDURE

Juries—Arkansas

Clarence STEWART, Jr. v. STATE of Arkansas.

Supreme Court of Arkansas, April 17, 1961, Rehearing Denied May 15, 1961, 345 S.W.2d 472.

SUMMARY: A Negro, convicted in a state court in Pulaski County, Arkansas, of first degree murder and sentenced to death, appealed to the state supreme court, contending, inter alia, that the jury panel should have been quashed because of alleged systematic inclusion of Negroes on the jury panel which constituted a denial of due process and equal protection guaranteed by the Fourteenth Amendment. The court reviewed testimony below to the effect that in 1959 about a fourth of the poll tax receipts issued in the county were to Negroes and that Negroes had served on jury panels in varying numbers in the county and in the court involved for a number of years. Also noted was testimony by jury commissioners that to determine qualifications of prospective jurors the commissioners used a city directory and the poll tax book; that it was their desire to select some Negroes "so they would have a say in the government of our county"; and that the commissioners did not have figures showing county racial proportions, but thought that there should be some Negroes on jury panels so they could represent the county government. The judgment was affirmed, the court holding that the evidence failed to show the alleged systematic inclusion, and stating that "we do not think it ground for complaint that Negroes were on the jury panel." Excerpts from the opinion dealing with this issue are printed below.

HOLT, Justice.

The appellant, Clarence Stewart, Jr., a Negro, was charged by information with the crime of first degree murder. The jury returned a verdict of guilty and punishment was assessed at death.

Finally, it is argued that the jury panel should have been quashed because of discrimination in the selection of the panel. Though it is not clear from appellant's brief, evidently this argument is based upon the proposition that systematic

inclusion, as alleged, would be a denial of due process and equal protection of the law under the Fourteenth Amendment to the Federal Constitution. We find it unnecessary to pass upon this argument since we think the evidence fails to show a systematic inclusion of Negroes on jury panels which would amount to discrimination. In fact, the evidence demonstrates that the jury commissioners made a special effort to avoid discrimination in the selection of veniremen. Discrimination in a jury's selection must be proved; it is not to be presumed, *Tarrance v. State of Florida*, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572, and the burden of establishing the discrimination is upon the defendant. *Akins v. State of Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692. The fact that there is a disproportion in the number of a particular race selected does not in itself show discrimination, *Akins v. Texas*, supra, and a defendant has no absolute right to have his race represented on any particular jury. *Bush v. Commonwealth of Kentucky*, 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354. To prove discrimination in the present case the defendant took the testimony of the county collector, the deputy circuit court clerk, and two of the jury commissioners. The collector was called and testified as to the number of poll tax receipts issued. No record could be had in prior years but the collector estimated there were 88,176 poll taxes issued in 1959 in Pulaski County and of that number perhaps 20,000 to 25,000 were sold to members of the Negro race. The deputy circuit clerk was called and testified that since the March term of 1940 through the March term of 1960 Negroes had served on the jury panels of Pulaski County. A tabulation of the number of Negroes serving on the jury panels in the first division of the Pulaski County Circuit Court shows that in 1955 a total of ten, in 1956 a total of six, in 1957 a total of fifteen, in 1958 a total of three, in 1959 a total of seven, and on the March term regular jury panel three Negroes were appointed. Mr. Edward Granoff, the first jury commissioner to testify, stated that he

sought to select persons who would make good jurors and he and the other jury commissioners used the city directory and looked to see if people were qualified and used the poll tax book to see if "they were paid up" and the jury list was used to see if the selected persons had served recently. He further testified that it was the desire of the jury commissioners to select some Negroes "so they would have a say in the government of our county." He stated he didn't pick the jury panels on a personal basis—just who he thought was best qualified. Mr. Jack L. Branch, the second jury commissioner to testify, said that the commissioners didn't have any figures and didn't show what the proportion of Caucasian to Negro poll tax holders would be, but that he and the other commissioners thought that there should be some Negroes on the jury panels so they could represent the county government. The third jury commissioner was not called to testify. This was all the testimony presented to show discrimination in the selection of the jury panels. Viewing this testimony as a whole, we think that it fails to establish any systematic, planned exclusion or inclusion of Negroes which would amount to unconstitutional discrimination in the selection of the jury panels. The American tradition of trial by jury contemplates an impartial jury drawn from a cross section of the community. The United States Supreme Court in the case of *Strauder v. State of West Virginia*, 1879, 100 U.S. 303, 25 L.Ed. 664, noted: " * * * (T)he constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." We do not think it ground for complaint that Negroes were on the jury panel.

* * *

The judgment is affirmed.

TRIAL PROCEDURE

Juries—Mississippi

Clyde KENNARD v. STATE of Mississippi.

Supreme Court of Mississippi, April 3, 1961, 128 So.2d 572.

SUMMARY: Alleging himself to be a Negro, a man indicted for burglary filed motions in the Forrest County, Mississippi, circuit court to quash the indictment and venire on the grounds of systematic exclusion of Negroes from the grand and petit juries in denial of due process and equal protection. At the hearing on the motions, only defendant introduced witnesses. They testified in effect that jury boxes are filled by members of the board of supervisors from a list of registered voters; that there are Negroes registered and qualified to vote in the county; that the jury box is filled without regard to race; that for many years Negroes have been summoned for jury services; and that Negroes have served on Forrest County juries in the recent past. The motions were overruled, defendant was convicted, and he appealed. The state supreme court affirmed, holding that defendant had failed to make a prima facie showing of systematic exclusion, because the witnesses proved the opposite; that there was no proof that even if Negroes were on the jury list there was an inappropriate and arbitrary number; and that the evidence refuted the contention that solely because of race or color Negroes have not been allowed to register for voting and were thus systematically excluded from jury service. Excerpts from the opinion on this point are printed below.

GILLESPIE, Justice.

Appellant filed motions to quash the indictment and the venire on the ground of systematic exclusion of Negroes from the grand and petit juries which constituted a denial of due process of law and equal protection of the law. After a hearing on these motions they were overruled, and appellant assigns this action of the trial court as error. The two motions were heard together and present but one question: Did the evidence require a finding by the trial court that there was a systematic exclusion of Negroes from the juries?

The hearing on this motion was rather lengthy and numerous witnesses were introduced, including nearly all the officials of Forrest County. In summary, the testimony showed as follows. The poll books of the county show "W" and "C" following the names of registered voters to indicate white and colored. There are Negroes registered and qualified to vote in the County, but the number was not shown. According to the last census, Forrest County had a total population of 45,055, of which 12,965 were non-white. The distribution of the white and non-white population among the five supervisors' districts and the various voting precincts was not shown; nor was distribution between urban and rural shown. The jury boxes are filled from a list of registered voters by the five members of the board of supervisors from their

several districts from the registered voters who are not disqualified for jury service.¹ The jury box is filled without regard to race. For many years Negroes have been summoned for jury service, but the proportion of white and colored was not shown. Negroes were summoned for jury service at the term of court preceding the one during which appellant was tried but it was not shown whether any were summoned for grand or petit jury service for the term during which appellant was tried. Negroes have served on juries in Forrest County in the recent past.

The motions alleged appellant is a Negro. It was traversed. No proof was offered that appellant was in fact a Negro. We deal with the case as if this was shown.

It cannot be lightly concluded that the officials of Forrest County have engaged in discriminatory practices by systematically excluding Negroes from jury service, and the burden was upon appellant to establish his allegations by proof in accordance with legal standards. *Akins v. Texas*, 325 U.S. 398, 65 S.Ct. 1276, 89 L.Ed. 1692; cf. *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866. And, while it was not

1. Under Section 1762, Mississippi Code of 1942, the following persons are disqualified for jury service: Females, those unable to read and write, those convicted of an infamous crime, those convicted of the unlawful sale of liquor within five years, common gamblers and habitual drunkards, overseers of roads within the past year, and those who served on a jury in the past two years.

shown in the present case that there were no Negroes on the grand or petit juries which indicted and tried appellant, if it be assumed there were not, the fact that Negroes were not included in a particular jury is not enough to establish that there was actual discrimination because of race. *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, (see cases therein cited). The facts as already stated are substantially without conflict, and any conflicts in the testimony were factual issues to be resolved by the trial court. *Akins v. Texas*, supra. Of the thirteen persons called by appellant in regard to whether Negroes were summoned to serve on juries, eight testified positively that Negroes had been so summoned over an extended period of time up to and including the July 1960 term of court. (Appellant was tried at the next term of court which convened in November 1960). None of the witnesses testified that Negroes had not been summoned. Some testified that Negroes had served on juries. The witnesses who did not know whether Negroes had been summoned for jury service were not shown to be in a position to know. For instance, the chancery clerk and members of the board of supervisors had no particular reason to know who was summoned for jury service. The lawyers who testified for appellant would know and they testified Negroes were summoned and served.

Appellant contends that he made a prima facie showing of purposeful discrimination by systematically excluding Negroes from juries. Apparently this contention is based on the ground that all of the witnesses were introduced by appellant. But appellant failed to meet the burden assumed by him because the witnesses proved the opposite. Cf. *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76; *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77.

Appellant relies largely on the recent case of *United States ex rel. Goldsby v. Harpole*, 5 Cir., 263 F.2d 71, a Mississippi case concerning Carroll County, Mississippi. In that case it was shown that over half the inhabitants of the county were non-white, yet none of the officers who testified could remember an instance of a Negro ever being on the jury list. Moreover, no Negroes were registered to vote in Carroll County. In the present case there was no such proof; the proof was to the contrary. The *Goldsby* case does not apply.

Appellant contends that even if Negroes were

on the jury list, there was an inappropriate and arbitrary number. There was no proof to this effect. Moreover, the courts have never held that a defendant is entitled to any particular number or proportion of jurors of a given race, or even that there must be a mixed race, or even that there must be a mixed jury. The question has always been whether there was a purposeful exclusion of members of the defendant's race because of race. This is a different thing from the right to have a jury composed of some or so many persons of the defendant's race. The constitutional requirements are met when a fair jury is selected without regard to race. Proportionate representation of races on a jury is not a constitutional requisite. *Akins v. Texas*, supra; *Ex parte Commonwealth of Virginia (Virginia v. Rives)*, 100 U.S. 313, 25 L.Ed. 667; *Cassell v. Texas*, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839. The courts have recognized that for various reasons there are instances of disproportionate representation of the white and colored races on jury lists. *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469. And in that same case it was recognized by the Supreme Court of the United States that it would not strike down state practices which are short of a denial of equal protection or due process in the selection of juries. This Court, in *Cameron v. State*, 233 Miss. 404, 102 So.2d 355, stated that since the decision of the United States Supreme Court in *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76, it is a matter of common knowledge that members of the boards of supervisors in most, if not all, of the counties of this State have been placing in the jury boxes the names of Negroes who meet the requirements of being men of good intelligence, sound judgment and fair character, and who do not possess the disqualifications enumerated in Section 1762, Mississippi Code of 1942. The same opinion recognized that it is not required that all the names of Negroes be placed in the jury box.

In *Seay v. State*, 212 Miss. 712, 55 So.2d 430, this Court applied the decision of the Supreme Court of the United States in *Patton v. Mississippi*, supra, and reversed the conviction on proof disclosing that Negroes had been systematically excluded from the grand jury which indicted Seay.

Appellant also contends that Negroes have not been allowed to register solely on the ground of race or color and that this has resulted in the systematic exclusion of Negroes from jury serv-

ice. This contention is refuted by the evidence. It was shown that there were qualified Negro electors and that there were Negroes who were on the jury lists over an extended period of time. Four persons testified for appellant that they had been unable to register, and that on some occasions when they tried to register they were accompanied by others who likewise were unable to register. The issue here is not whether some individual or individuals have been denied the right to register. If such was the issue, the proof in this case in regard to the persons just referred to falls short of proving that these individuals were qualified to register, or that they were denied the right to register because of race. Cf. *Darby v. Daniel*, D.C., 168 F.Supp. 170.

We have carefully considered the contention of appellant and the authorities he relies on and conclude that he failed to establish his charge that he was denied due process and equal protection of the laws by reason of Negroes being systematically excluded from the juries of Forrest County.

Appellant filed a motion for a writ of subpoena duces tecum directing the circuit clerk to appear and submit to the court the registration books containing the names from which all jury lists are drawn. He assigns error here contending that the lower court overruled the motion. We are of the opinion that appellant is not in a position to complain in this regard. There appears in the record the following: "Here defendant's motion for subpoena duces tecum was withdrawn by counsel for defendant."² Appellant

2. This entry imports absolute verity since appellant had ten days notice to examine and correct transcript. Section 1641, Mississippi Code of 1942. Appellant makes no contention the record is not correct.

may not complain of the lower court's failure to sustain his motion when the motion was withdrawn. The withdrawal of the motion was made by appellant's counsel prior to the beginning of the trial on the merits. Moreover, it does not appear from the record that appellant ever called up for hearing his motion for subpoena duces tecum, nor was an order ever entered overruling the motion. The record shows that during the questioning of the circuit clerk appellant's counsel requested time to either investigate or have the clerk get certain information from the records as to the number of Negroes registered to vote. It was shown that such a search would take an estimated three weeks' time, if the clerk's other duties were attended. It was also shown that the records were under seal in connection with an election. Whether the request was made during the questioning of the clerk on the motion to quash the indictment and the venire had reference to the motion for subpoena duces tecum is not clear. It is clear that appellant never called up for hearing the motion for duces tecum and the court never entered an order thereon. These circumstances and the fact that appellant withdrew the motion indicate the lack of merit in this assignment of error.

After a careful review of the record we are of the opinion that there is no reversible error and that the question of appellant's guilt was a question for the jury, whose verdict is fully supported by the proof.

Affirmed.

LEE, P. J., and McELROY, RODGERS and JONES, JJ., concur.

TRIAL PROCEDURE

Juries—South Carolina

STATE v. Ray Landy YOUNG.

Supreme Court of South Carolina, April 18, 1961, 119 S.E. 2d 504.

SUMMARY: Prior to the trial in a South Carolina state court of a Negro charged with murder, the defense requested the trial judge to ask prospective jurors upon their individual voir dire whether "if it develops under the testimony and evidence that the defendant is guilty of murder, would the fact that he is a Negro stand in your way in determining a recommenda-

tion to mercy?" The judge refused the request, stating that the question presupposed the guilt of the accused and that the court's examination would cover the request. Subsequently inquiry was made of each prospective juror as to whether he "had expressed or formed any opinion or was sensible of any bias or prejudice", and in each instance the answer was in the negative. Defendant was convicted and sentenced to be executed. On appeal, the judgment was affirmed by the state supreme court. The court, noting that defendant had been present and that his race was obvious to all, held that the question asked "encompassed the request" of defense counsel, and concluded that the prospective jurors' "answers that they were not conscious of any bias or prejudice could mean only that they were not conscious of any bias or prejudice for any cause." It was therefore held that the refusal to answer the question as presented was not an abuse of discretion amounting to error of law. Excerpts from the opinion dealing with this issue are presented below.

TAYLOR, Justice.

Appellant was tried and convicted at the October, 1959, Term of General Sessions Court for Greenville County, of the charge of having murdered one John Kehayas and sentenced to be executed.

All prospective jurors were placed upon their individual voir dire. The defense, at that time, requested that the following question be asked the prospective jurors: "If it develops under the testimony and evidence that the defendant is guilty of murder, would the fact that he is a Negro stand in your way in determining a recommendation to mercy?" This request was refused by the trial Judge.

The Statutory questions contained in Sec. 38-202, Code of Laws of South Carolina, 1952, were propounded to each juror individually; and after each juror was examined on his voir dire, if found to be qualified by the presiding Judge, he would state: "Unless there is some other question the juror is qualified." Upon occasion other questions were propounded, but the trial Judge refused the above-quoted request, stating that the question presupposed the guilt of the accused and further that the Court's examination would cover the request.

In accord with one of the provisions of Sec. 38-202, supra, inquiry was made of each prospective juror as to whether he had expressed or formed any opinion or was sensible of any bias or prejudice therein. In each case this question was answered in the negative; therefore, each juror stated that he was not sensible of any bias or prejudice for any cause. The question of the impartiality of the juror is addressed to the discretion of the trial Judge; State v. Prater, 26 S.C. 198, 21 S.E. 108; and the scope of inquiry on voir dire is within the sound discretion of the Circuit Judge, State v. Carson, 131 S.C. 42, 126

S.E. 757; State v. Nance, 25 S.C. 168; and he has the exclusive power to determine a juror's competency and a finding on such is not reviewable except for error of law, South Carolina Constitution, 1895, Art. 5, Sec. 4; State v. Faries, 125 S.C. 281, 118 S.E. 620. If the question of the indifference of a juror is a mere question of fact, it is not reviewable upon appeal, State v. Haines, 36 S.C. 504, 15 S.E. 555; State v. Robertson, 54 S.C. 147, 31 S.E. 868; State v. Fuller, 229 S.C. 439, 93 S.E.2d 463; unless the conclusion of the trial Judge is wholly unsupported by the evidence, State v. Williamson, 65 S.C. 242, 43 S.E. 671; State v. Mittle, 120 S.C. 526, 113 S.E. 335. If there is evidence, however, tending to support the finding of the juror's competency, there is no error of law, State v. Faries, supra.

In State v. Bethune, 86 S.C. 143, 67 S.E. 466, 468, defense counsel requested that the following question be propounded to the proposed juror: "Whether, in spite of the fact that the defendant at the bar is a negro, he would be influenced thereby in passing on the evidence." This request was refused and this Court held that there was no error as the trial Judge had already questioned the jurors as provided in the statute; and in the later case by the same title, reported in 93 S.C. 195, 75 S.E. 281, 282, the Court stated with respect to this same question: "The juror had already sworn that he was not conscious of any prejudice or bias for or against the prisoner. Therefore his answer to the proposed question if he had been allowed to answer must have been in the negative."

In instant case the defendant, a Negro, was present, of course, at the time and the fact that he was a Negro was obvious to all. Each prospective juror stated that he was not sensible of any bias or prejudice. The trial Judge felt that it would have been improper to submit the

proffered question for the reason that it presupposed his guilt and further that the statutory questions fully covered the subject. Their answers that they were not conscious of any bias or prejudice could mean only that they were not conscious of any bias or prejudice for any cause. The statutory questions encompassed the request, and we find no abuse of discretion

amounting to error of law in refusing the question as presented. . . .

For the foregoing reasons, we are of opinion that all exceptions should be dismissed and the judgement of the Court affirmed; and it is so ordered. Affirmed.

OXNER, LEGGE and MOSS, JJ., concur.

TRIAL PROCEDURE

Juries—Federal Courts

UNITED STATES of America v. Earl L. DANIELS.

United States District Court, Eastern District, Pennsylvania, February 13, 1961, 191 F.Supp. 129.

SUMMARY: An individual, convicted in a federal court of receiving, concealing, and selling narcotic drugs, filed in the court a "Petition to Strike Out Judgment," which the court treated as a motion attacking sentence. The petition stated, inter alia, that the United States Attorney used two of his peremptory challenges to exclude two Negroes from the petit jury, which action, petitioner's attorney explained to him, was taken because the Negroes might be prejudiced in his favor. The petition was denied, the court declaring that any evidence to establish the motives of the United States Attorney would be inadmissible since peremptory challenges may be used without any assigned or stated cause.

TRIAL PROCEDURE

Juries—Federal Courts

UNITED STATES of America v. Frank ROMANO, et al.

United States District Court, District of Connecticut, March 10, 1961, 191 F.Supp. 772.

SUMMARY: Defendants in a criminal prosecution in a federal court in Connecticut moved for a dismissal of their indictment because allegedly the jury list from which the grand jury was drawn was selected in a manner contrary to law. Among the bases for complaint was the charge that the jury list contained too few persons of Italian extraction and too few persons of Jewish faith and that it did not disclose how many persons on it are Negroes. Reviewing the system in use in that district for making a jury list, the court concluded that the jury commissioners had been conscious of their duty to provide a representative jury list free from systematic exclusion based on sex, race, creed, national origin or economic or social status. Defendants claimed, nevertheless, that in this instance the system had failed to provide a jury list containing a representative cross-section of the qualified populace. Noting that defendants' claim as to the numbers of the persons of Italian extraction and Jewish faith on the list rested on defendants' own conclusions drawn from the spelling of names on the list, the court ruled that this was "too insubstantial and speculative a process to give it evidential

recognition." And there was found to be no evidence as to a deficiency of Negro representation on the panel. Finding that defendants had failed to bear their burden of showing the jury list to be suspect, the court held that there were no grounds for a dismissal of the indictment or for an investigation of the methods in use for selecting the jury list. Excerpts from the opinion on this point are printed below.

ANDERSON, Chief Judge.

The defendants, Frank Romano, John Ottiano, Edward Romano and Antonio Vellucci, ask to have the indictment dismissed because the Grand Jury which returned it was drawn from a group of veniremen which was drawn from a jury list, selected in a manner which was contrary to law.

The bases for their complaint that the jury list was improperly made up are:

(1) that it contains too many persons from New London County,

(2) that it contains too few persons of Italian extraction,

(3) that it contains too few persons of the Jewish faith,

(4) that it does not disclose how many persons are of the Negro race,

(5) that there are included too many persons who attended college, and

(6) that there are included too many persons "of the self-employed or management segment of the community."

The defendants argue that if there is not enough before the court at this stage of their motion to warrant dismissal, then they should be permitted to investigate and examine every detail of the acts of the Jury Commissioners in selecting the jury list. The defendants concede that, while no one of the claimed deficiencies standing by itself might be sufficient to overcome the presumption that the jury list is a representative cross-section of the community, all of them together are enough to require a full investigation and examination of the steps taken in making the jury list.

In 1955 in connection with motions to dismiss indictments in cases then pending, this court dismissed an indictment and discharged the array (*United States v. Silverman*, D.C., 129 F.Supp. 496) and, thereafter, approved and adopted, for use of this court, a new system for making a jury list, which, with a few modifications, is the system under which the jury list of March 1, 1960, presently under attack, was produced. This new system is fully set out in the second *Silverman* case, *United States v. Silverman*, D.C., 132 F.Supp. 820. Reference is made to the Report to the Judicial Conference of its

Sub-Committee on the Operation of the Jury System, January, 1960. See particularly page 89, et seq. That system has since been slightly modified in response to recent statutory changes. Title 28 § 1861 as amended September 9, 1957. The present selection procedure, which allows for those modifications, is set out in full in Appendix A, hereto attached.

In general outline, the pattern followed is that the Commissioners, from their own inquiry, make up, as they describe it, a list of citizens "from a variety of background whom [they] have reason to believe have a wide acquaintance in their respective communities and are esteemed therein as persons of good character, approved integrity and sound judgment and fair education," as "suggesters," whose function it is, under written instructions from the Jury Commissioners, to propose to them the names of persons in their communities who may be likely material for the jury list. The Jury Commissioners then, after inquiry of their own and careful consideration, determine those citizens who are qualified for inclusion in the jury list. A study of the system supplemented by the testimony of Mr. Earl, Clerk of the Court, and the only Jury Commissioner called to testify, makes it abundantly clear that at every step of the way the Jury Commissioners have been conscious of their duty to provide a jury list which is a representative cross-section of the qualified populace and from which no special class or group, particularly such as may be characterized by sex, race, creed, national origin or economic or social status, is systematically excluded. *Frazier v. United States*, 1948, 335 U.S. 497, 504, 69 S.Ct. 201, 93 L.Ed. 187; *Ballard v. United States*, 1946, 329 U.S. 187, 192-194, 67 S.Ct. 261, 91 L.Ed. 181; *Thiel v. Southern Pac. Co.*, 1946, 328 U.S. 217, 220-221, 66 S.Ct. 984, 90 L.Ed. 1181; *Glasser v. United States*, 1942, 315 U.S. 60, 85-86, 62 S.Ct. 457, 86 L.Ed. 680.

The defendants expressly disclaim any accusation of such intentional or systematic exclusion by the Jury Commissioners. Moreover, they do not attack the system. The nub of their contention is that an analysis of (1) the names and addresses of the 905 persons on the jury list of

March 1, 1960, (2) the 122 questionnaires of persons actually summoned as veniremen from that jury list subsequent to its establishment, (3) the 50 venireman drawn for the choosing of the Grand Jury of May 3, 1960 and (4) the 23 members of the Grand Jury, itself, discloses reasonable ground to believe that the functioning of the system, in this instance, somehow went awry and produced a jury list which was not a representative cross-section of the qualified populace. They assert that, even if there is not enough evidence from this analysis to call for a dismissal of the indictment, there is enough to require a full and complete examination of all of the acts of the Jury Commissioners in selecting the jury list in question.

A court, however, should not be required to undertake a full scale investigation of its jury panel or the array until it is suspect. *Padgett v. Buxton-Smith Mercantile Co.*, 10 Cir., 1960, 283 F.2d 597, certiorari denied 1961, 81 S.Ct. 713; *Windom v. United States*, 10 Cir., 1958, 260 F.2d 384. The burden of showing that it is suspect lies with the defendants. *Frazier v. United States*, 1948, 335 U.S. 497, 69 S.Ct. 201.

In the present case the defendants offer the six grounds above mentioned as an accumulation of defects which, they claim, render the array suspect. These grounds and the evidence the defendants have offered to show their existence will be discussed seriatim.

The second and third grounds for complaint, are that there are too few persons of Italian extraction and too few of the Jewish faith. The defendants' claim as to the sizes of these groups rests entirely on the defendant's own conclusions drawn from the spelling of names in the jury list. This is altogether too insubstantial and speculative a process to give it evidential recognition; and it is nothing upon which the court can find that there is a likely defect in the selection of the array. The questionnaires sent out by the Jury Commissioners do not include inquiry as to race, ethnic origin or religious faith.

The fourth basis of complaint is largely negative, as the defendants claim they do not know from the jury list how many Negroes are on it. There is no claim of systematic exclusion of Negroes and the court has observed Negroes on several panels drawn from the array in question. There is no evidence in support of this claim, either standing alone or in conjunction with the

others, which would justify ordering a full investigation of the selection of the array.

The court, therefore, concludes that the defendants have shown nothing which calls for a dismissal of the indictment or for a full scale investigation of the methods and means used for selecting the jury list of March 1, 1960.

The Jury Commissioners are entitled to, and have a duty to exercise their judgment and discretion in determining what is a representative cross-section of the community. The defendants' principal claim seems to be that to be "representative" there should exist in the array roughly the same proportion of members from the particular groups, the systematic or arbitrary exclusion of which is forbidden by the law, as each such group bears to the general qualified populace in the whole district. But the classes to be considered in making a representative cross-section are almost infinite in number and are not limited to sex, race, creed, national origin or economic or social status. These are not the only human characteristics. They are given emphasis in connection with the prohibition against systematic or arbitrary exclusion because the experience of the law is that these groups have been the subjects of discrimination. "Selecting Federal Court Jurors" by Merrill E. Otis, U.S.D.J. Published by Section of Judicial Administration of the American Bar Association, August, 1942. Of course, in cases where evidence of the characteristic of members of the jury list discloses little more than a token representation of a dominant or distinguishing trait of a substantial segment of the qualified populace, an inference may be drawn of the likelihood of arbitrary exclusion; and a full investigation of the selection of the array might well be called for. However, neither the quantity nor quality of the evidence offered in support of this motion furnish the grounds for such an extended inquiry in this case.

The motion is denied.

Appendix A

Selection of Jurors by the Jury Commission

The Jury Commission for the United States District Court for the District of Connecticut has adopted the following procedure for use in obtaining Grand and Petit Jurors.

I

- (a) Each member of the Jury Commission

selects from those areas of the District of Connecticut prescribed by Court Order of September 7, 1954, a number of citizens from a variety of backgrounds whom he has reason to believe have a wide acquaintance in their respective communities and are esteemed therein as persons of good character, approved integrity, sound judgment and fair education. The function of these citizens—hereinafter called "suggesters"—is to furnish to the Jury Commission the names of residents of their communities who, in their considered opinions, are qualified for jury service.

(b) An index card (Exhibit 1) is prepared for each suggester.

(c) The Jury Commissioners confer on their choices of suggesters. In this conference they exchange information on the qualifications of the suggesters selected by each; they eliminate duplications of names; and they survey the entire list to minimize the possibility that in their selection of suggesters they have inadvertently discriminated against any significant area or racial, religious, occupational or environmental group. When a suggester has been approved by both Commissioners, his index card is initialed by them. (See Exhibit 1).

(d) A letter (Exhibit 2) is sent to each suggester. This letter outlines in detail the points that the suggester must consider in making up his list of proposed jurors. Enclosed with this letter is a ruled form (Exhibit 2a) and a self-addressed envelope requiring no postage (Exhibit 2b) for use by the suggester in submitting his list of proposed jurors to the Jury Commission.

(e) The date on which the above letter and documents (Exhibits 2, 2a and 2b) are sent to the suggester is entered on his index card. (See Exhibit 1)

II

(a) When a list of names and addresses is returned by a suggester, such list is file-stamped as to the date received. The Jury Commissioners thereafter examine each list and when satisfied of its completeness as to date, signature, etc., they place thereon their initials and the date of such examination. (See Exhibit 3).

(b) A file folder (Exhibit 4) is then prepared for the suggester's return. Such folders are kept in a filing cabinet marked "Suggesters."

(c) The date on which the suggesters return was received is marked on his index card as indicated in Exhibit 5.

(d) A letter (Exhibit 6) is sent to the suggester thanking him for his cooperation, and so marked on the card. (See Exhibit No. 5).

III

(a) A form letter from the Judges of this Court (Exhibit 7) is sent to each person whose name appears on a suggester's list, together with a questionnaire (Exhibit 7a), designed to elicit information for use by the Jury Commissioners in their determination of whether or not the suggested person is eligible to serve as a Grand or Petit Juror. A self-addressed envelope which requires no postage (Exhibit 7b) is also enclosed for use by each prospective juror in returning his or her questionnaire.

(b) An index card (Exhibit 8) is prepared for the name of each person submitted by the suggester at the time Exhibits 7, 7a and 7b are mailed. This card includes the name and address of each such person, the suggester's initials, and the date the questionnaire was mailed. Such cards are kept in a file drawer labeled "Names of Prospective Jurors."

IV

(a) When the questionnaire is returned by a prospective juror, it is file-stamped to show the date received. This date is inserted on the juror's index card as indicated in Exhibit 9. If the spelling of the name or the address on the questionnaire is different from that appearing on the index card, the index card is corrected—either by making a completely new index card or by altering the old one to coincide with the questionnaire.

V

(a) The questionnaire of each prospective juror is examined by both Jury Commissioners.

(b) If any significant question has been left unanswered, a letter (Exhibit 10) is addressed to such prospective juror covering the return of the questionnaire for completion.

(c) In those instances where the Jury Commissioners consider that more information is desirable in conjunction with an answer given to any question of the questionnaire, [such as, for example, Question 11, relating to permanent disability impairing the person's capacity to serve as a juror], a special letter (Exhibit 11) requesting such additional information is sent to the prospective juror. In those instances where the Commissioners feel that correspondence with the

prospective juror is not well designed to elicit the necessary information, either one or both of them will write to other sources or make telephonic or personal investigations.

(d) The Jury Commissioners meet in conference and, after considering all of the information available with respect to each prospective juror, determine whether or not such prospective juror meets all of the statutory standards for inclusion in the jury array. If he or she is accepted for jury service, it is so indicated by the Jury Commissioners on the face of the questionnaire (See Exhibit 12) and the date of the acceptance is entered on the juror's index card. (See Exhibit 13). If he or she is rejected, that fact and the reason for rejection is indicated on the face of the questionnaire, (See Exhibit 14), and the date of rejection is entered on the juror's index card. (See Exhibit 15).

(e) Separate files are maintained for the questionnaires of those who are accepted for jury service and those who are rejected. Corresponding indices are kept separately.

VI

When directed by a Judge of this Court to establish a new jury array or to augment the existing array, the Jury Commissioners:

(a) Have a separate card (Exhibit 16) prepared for each accepted juror containing the name and address of each such juror. Hereafter these cards will be called "jury cards".

(b) Have a jury list prepared to correspond with the jury cards.

(c) Check the file of jury cards against the jury list to insure the accuracy of that list and its numerical sufficiency in terms of the minimum number of names required by the Judge's directing order.

(d) Take the jury box and jury cards to the Courtroom and there, in the presence of witnesses and with the Court Reporter recording the proceedings, fill the jury box by alternately placing jury cards into said box until all cards have been so placed.

TRIAL PROCEDURE

Juries—Texas

Joe Cephas SINGLETON v. STATE of Texas.

Court of Criminal Appeals of Texas, March 22, 1961, rehearing denied April 26, 1961, 346 S.W.2d 328.

SUMMARY: Defendant, convicted of rape and sentenced to death in a criminal district court of Texas, appealed to the Court of Criminal Appeals of Texas. Defendant argued that the venire of jurymen at his trial was improperly selected because the cards on the jury wheel showed the race of the potential jurors. The appellate court, in affirming the conviction, rejected this contention, holding that where the venire included Negroes and the race of the veniremen could not be ascertained before the card was drawn, the jury was properly selected. Excerpts from the opinion are reprinted below.

MORRISON, Judge.

The offense is rape; the punishment, death.

It was established by appellant's confession, the testimony of the prosecutrix, and the presence of his fingerprints on a venetian blind that it was he who broke and entered a widow's home after midnight and by means of threats and the exhibition of a knife had carnal knowledge of her without her consent.

Appellant did not testify and relied upon the

defense of insanity. The State produced lay and expert witnesses who testified that he was sane, and the jury resolved this issue against appellant.

We address ourselves to the complaints raised by brief and in oral argument.

Appellant, for the first time in his motion for new trial, attempts to raise the question of an irregularity in the selection of the venire which tried him. No motion to quash the panel was made prior to the trial, as is required by the

holdings of this Court in such cases as *Campbell v. State*, 122 Tex.Cr.R. 494, 56 S.W.2d 460; *Jones v. State*, 37 Tex.Cr.R. 433, 35 S.W. 975; and *Caldwell v. State*, 12 Tex.App. 302, and the cases therein cited.

Reliance is had, however, upon the holdings of the Supreme Court of the United States in *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244, and *Williams v. State of Georgia*, 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed. 1161.

At the hearing on the motion, it was shown that when the jury wheel was filled an alphabetical indication was typed following each name showing the sex and the race of the person whose name appeared on the card.

Avery was reversed because different colored cards were used for persons of different races plus the fact that no colored persons appeared on the panel from which Avery's jury was selected. In the case at bar, there were 20 colored persons on the venire of 150 from which this appellant's jury was drawn.

We move now to *Williams*, which requires a more careful discussion. In *Williams*, there were 4 colored persons on the list of 120. The Georgia Solicitor General took the position before the Supreme Court of Georgia that there was no showing of a denial of equal protection, but when he appeared before the Supreme Court of the United States he admitted that the system used constituted a denial of equal protection. Upon the basis of such admission, the Supreme Court of the United States remanded the case to the Supreme Court of Georgia for further consideration. Upon reconsideration of the case, the Supreme Court of Georgia adhered to their original opinion. *Williams v. State*, 211 Ga. 763, 88 S.E.2d 376. Writ of certiorari was again applied for, and the Supreme Court of the United States denied the same (*Williams v. State of Georgia*, 350 U.S. 950, 76 S.Ct. 326, 100 L.Ed. 828), and a motion for rehearing was denied.

In *Avery* and *Williams*, the cards were colored so that the officer drawing from the wheel might know *before* he drew a card out of the wheel the race of the person he was drawing. In the case at bar, the card had to be drawn from the wheel *before* the officer could see the "wf" indicating that the person so drawn was a white female, or whatever the alphabetical designation indicated. Had there been no members of

the colored race on the panel in the case at bar, then there is a probability that Avery would have been controlling, but since there were 20, and since the Supreme Court denied the second writ in *Williams*, we have concluded that a denial of equal protection has not been shown.

* * *

Finding the evidence sufficient to support the conviction and no reversible error appearing, the judgment of the trial court is affirmed.

WOODLEY, P. J., absent.

* * *

Rehearing

On Appellant's Motion for Rehearing
McDONALD, Judge.

Appellant ably urges in his motion for rehearing and in oral argument that this court erred in holding that the decisions of the Supreme Court of the United States in *Avery v. State of Georgia*, supra, and in *Williams v. State of Georgia*, supra, do not control in the instant case for the reason that no actual discrimination was shown by the record.

Appellant takes the position that the United States Supreme Court's decision in the *Avery* case, as explained in the *Williams* decision, means that the danger of discrimination inherent in the system of jury selection which was struck down in the *Avery* case is present in this case.

We feel that a correct disposition was made of the instant case in our original opinion. We here reiterate what was stated in that opinion: " * * * we have concluded that a denial of equal protection has not been shown," and further conclude that the facts in the case at bar refute the presence of any discrimination in jury selection.

Appellant vigorously urges that discrimination does not have to be shown, but that where there could be a danger of discrimination the decision in *Avery* controls.

We feel that this appellant's rights were fully safeguarded, not only because of the lack of any showing on his part that he was discriminated against but, further, that there was not present—as disclosed by the proceedings in the instant case—any actual or apparent discrimination.

We find no merit in any of the other contentions advanced by appellant's able counsel.

The motion for rehearing is overruled.

TRIAL PROCEDURE

Speedy Trial—Arkansas

Marvin Aron HAMMOND, et al. v. William J. KIRBY.

Supreme Court of Arkansas, May 8, 1961, 345 S.W.2d 910.

SUMMARY: On March 23, 1961, three persons were arrested and jailed in Pulaski County, Arkansas, on charges of rape. Insisting that they were being denied an immediate trial on the merits, defendants brought an original proceeding in the state supreme court for a writ of mandamus to compel the judge of the criminal division of the Pulaski Circuit Court forthwith to set their cases for trial. Before the supreme court, defendants admitted that if brought to trial at the present time they would immediately move to quash the jury panel of the trial court on the claim of systematic exclusion of Negroes, citing the decision of the United States Court of Appeals for the Eighth Circuit in *Bailey v. Henslee* [6 Race Rel. L. Rep. 589 supra]. Noting that the trial judge had exercised his discretion to delay defendants' trial until September in view of the possibility that the language in the Bailey opinion concerning systematic exclusion in Pulaski County might in the meantime be clarified, the state supreme court denied the petition "at this time." The court reasoned that it was pointless to require a trial immediately when defendants stated their intention to move at such trial to quash the jury panel, which action would result in the judge continuing the cases to its September term so that a new panel could be obtained.

McFADDIN, Justice.

This is an original proceeding in which the petitioners seek a writ of mandamus to compel the Honorable William J. Kirby, Judge of the First Division of the Pulaski Circuit Court, to forthwith set their cases for trial. The Attorney General, representing the State, waived time in which to answer and entered the appearance of the State, and the matter was presented orally before the Court without delaying the hearing for the preparation of briefs. We recite as facts the admissions and statements made by counsel for opposing sides in the oral argument before this Court.

The three petitioners were arrested and committed to jail on March 23, 1961, charged with the crime of rape (§ 41-3401, Ark.Stats.). The terms of the Pulaski Circuit Court are the First Monday in March and the Fourth Monday in September (§ 22-310, Ark.Stats.). By law, all criminal cases in Pulaski County are tried in the First Division of the Pulaski Circuit Court, unless otherwise assigned by consent of the Judges. (§ 22-327, Ark.Stats.); and there is no claim of such consent in the case at bar. The petitioners have not been admitted to bail, and their attorney frankly told this Court that bail was not in issue despite some language in the petition.¹

1. Petitioners' attorney was informed that the procedure for bail would be by petition for writ of *habeas corpus* in the Trial Court and then by *certiorari* to this

The petitioners insist that they want an immediate trial on the merits, in the First Division of the Pulaski Circuit Court, and they claim that such trial is being denied them. The petitioners' attorney admitted that if they should be brought to trial at the present time they would immediately move to quash the jury panel of the First Division of the Pulaski Circuit Court on the claim of systematic exclusion of Negroes. The basis of such motion would be the present holding of the United States Circuit Court of Appeals of the Eighth Circuit in the case of *Bailey v. Henslee*, 287 F.2d 936.

The decision of the United States Circuit Court of Appeals in the *Bailey v. Henslee* case is responsible for all of the delay that has occurred. In that case, the conviction of Bailey was set aside on the claim that there had been deliberate exclusion of Negroes on trial juries in the First Division of the Pulaski Circuit Court; and the decision indicated that the omission of Negroes from the jury panels of the Second and Third Divisions of the Pulaski Circuit Court might have some bearing.²

Court (*Parnell v. State*, 206 Ark. 652, 176 S.W.2d 902; and *Fikes v. State*, 221 Ark. 81, 251 S.W.2d 1014). Petitioners' attorney admitted this and frankly state that any language in the petition regarding bail should be stricken, as bail was not desired at this time.

2. Here are two pertinent excerpts from the opinion of the United States Circuit Court of Appeals in the *Bailey* case, delivered on March 17, 1961:

"We mention only that there has been Negro rep-

Petitioners insist that they want a speedy trial as guaranteed under the Constitution; but they frankly confess that if they were called to trial, they would delay the trial by motion to quash the jury panel. Should their motion to quash the jury panel of First Division be granted, then the Circuit Court, in the exercise of discretion, could postpone the trial of petitioners until a new jury panel could be obtained either at the present or at the next term, which is in September, 1961.

Furthermore, Judge Kirby, as the presiding Judge of the First Division, has no control whatsoever over the Jury Commissioners of the Second or the Third Division of the Pulaski Circuit Court. Each Court selects its own Jury Commissioners (§§ 39-201, 22-318, Ark.Stats.). So far as concerns Jury Commissioners and the selection of jurors, the three Divisions of the Pulaski Circuit Court are as separate of each other as though they were in different counties. If Judge Kirby should quash his present jury panel on motion of the petitioners, and the Jury Commissioners should bring in a new jury panel with

a great preponderance of Negroes, still the petitioners could move to quash the new jury panel because there had been no Negroes on the panels in either the Second or Third Division of the Pulaski Circuit Court, which are Civil Divisions.

Until the language of the Circuit Court of Appeals in the Bailey case can be clarified, either by that Court or by the Supreme Court of the United States, Judge Kirby has delayed until September the trial of these petitioners—after their attorney had indicated they were going to move to quash the jury panel—in order to prevent the doing of a useless thing, i. e., quashing the present jury panel, which would result in continuing the cases until the September Term. We issue a writ of mandamus to require a court to *act*, but not to control its *discretion*. *State ex rel., Pilkinton v. Bush*, 211 Ark. 28, 198 S.W.2d 1004; *Better Way Life Ins. Co. v. Graves*, 210 Ark. 13, 194 S.W.2d 10. In *Barney v. City of Texarkana*, 185 Ark. 1123, 51 S.W.2d 509, 511, we said: “* * * the writ of mandamus does not issue as a matter of absolute right, and it would be an improper use of the writ to issue it when it is clearly apparent to the court to which application is made that it would serve no purpose and would be useless when issued.” The petitioners cannot expect us to issue a writ of mandamus to require a trial when they frankly state that as soon as they are called for trial they will move to quash the jury panel, which would result in the Trial Judge exercising discretion to continue the cases to the September Term.

The petition for writ of mandamus is denied at this time.

resentation, at least since 1952, on the regular panels of the First Division; that there has been no (or, at the most, one) instance of Negro representation on the alternate panel; that there is no positive evidence of any Negro representation on the special panels; that since 1939 no Negro has served on any panel in the Second and Third Divisions; * * *

“Since 1939 no Negro has ever served on any kind of panel, regular, alternate or special, in the Second or Third Divisions of the Pulaski County Circuit Court. A fact of this kind, as has been noted above, would support a conclusion that a prima facie case of discrimination in the selection of juries in these civil divisions has been established.” [287 F.2d 940]

LEGISLATURES

EMPLOYMENT

Anti-Discrimination Law—Kansas

House Bill 243 of the 1961 Acts of the Kansas legislature, approved April 13, 1961, declares the opportunity to secure and hold employment to be a civil right, and prohibits discrimination in hiring, firing and conditions of employment. The duties of the State's "Commission against Discrimination" are defined and expanded, and its name changed to "Commission on Civil Rights"

AN ACT prohibiting discriminatory employment practices and policies based upon race, color, religion, or country of ancestral origin, providing for a commission on civil rights, providing for the enforcement of the provisions of this act, defining certain words and phrases, prescribing powers and duties, providing penalties for violations of this act, amending sections 44-1001, 44-1002, 44-1003, 44-1004, and 44-1005 of the General Statutes Supplement of 1959, and repealing said original sections, and also repealing section 44-1008 of the General Statutes Supplement of 1959.

Be it enacted by the Legislature of the State of Kansas:

Section 1. Section 44-1001 of the General Statutes Supplement of 1959 is hereby amended to read as follows: Sec. 44-1001. This article shall be known as the Kansas Act Against Discrimination. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, safety, health and peace of the people of this state. The practice or policy of discrimination against individuals in relation to employment by reason of their race, religion, color, national origin or ancestry is a matter of concern to the state, that such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state. It is hereby declared to be the policy of the state of Kansas to eliminate discrimination in all employment relations. It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless of race, religion, color,

national origin or ancestry, in securing and holding, without discrimination, employment in any field of work or labor for which he is properly qualified. It is further declared that the opportunity to secure and to hold employment is a civil right of every citizen. To protect that right, it is hereby declared to be the purpose of this act to establish and to provide a state commission having power to eliminate discrimination in employment because of race, religion, color, national origin or ancestry, either by employers, labor organizations, employment agencies or other persons as hereinafter provided.

Sec. 2. Section 44-1002 of the General Statutes Supplement of 1959 is hereby amended to read as follows: Sec. 44-1002. When used in this act: (a) The term "person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. (b) The term "employer" includes any person in this state employing eight (8) or more persons, and any person acting directly or indirectly for an employer as herein defined, and labor organizations, nonsectarian corporations, and organizations engaged in social service work, and the state of Kansas and all political and municipal subdivisions thereof, but shall not include a nonprofit religious, charitable, fraternal, social, educational, or sectarian association or corporation. (c) The term "employee" does not include any individual employed by his parents, spouse, or child, or in the domestic service of any person. (d) The term "labor organization" includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances,

terms or conditions of employment, or of other mutual aid or protection in relation to employment. (e) The term "employment agency" includes any person or governmental agency undertaking with or without compensation to procure opportunities to work, or to procure, recruit, refer, or place employees. (f) The term "commission" means the commission on civil rights created and amended by this act. (g) The term "unlawful employment practices" includes only those unlawful practices and acts specified in section 5 of this act, and includes segregate or separate.

Sec. 3. Section 44-1003 of the General Statutes Supplement of 1959 is hereby amended to read as follows: Sec. 44-1003. There is hereby created a commission to be known as the antidiscrimination commission: *Provided*, After the effective date of this act, said commission shall be known as the commission on civil rights: *Provided further*, Persons appointed as members of the antidiscrimination commission shall continue to serve for the remainder of their terms as members of the commission on civil rights and until their successors are appointed and qualified. Said commission shall consist of five (5) members, two (2) of whom shall be representative of industry, two (2) of whom shall be representative of labor, and one (1) of whom shall be from the public at large, to be known as commissioners, who shall be appointed by the governor, and one (1) of whom shall be designated by the governor as chairman, who shall preside at all meetings of the commission and perform all the duties and functions of the chairman thereof. The commission may designate one (1) of its members to act as chairman during the absence or incapacity of the chairman, and, when so acting, the member so designated shall have and perform all the duties and functions of the chairman of the commission. The term of office of each member of the commission shall be for four (4) years and until his successor is qualified: *Provided*, That of the commissioners first appointed, one (1) shall be appointed for a term of one (1) year, one (1) for a term of two (2) years, one (1) for a term of three (3) years, and two (2) for a term of four (4) years. Any member chosen to fill a vacancy occurring otherwise than by expiration of term, shall be appointed for the unexpired term of the member whom he is to succeed. A majority of the then members of the commission shall constitute a

quorum for the purpose of conducting the business thereof. Vacancies in the commission shall not impair the right of the remaining members to exercise all the powers of the commission. Each member of the commission shall receive as compensation for his services, the sum of fifteen dollars (\$15) per day for each day actually spent in the discharge of his official duties: *Provided*, This limitation shall not apply to any expenses actually incurred by any member in traveling to and from the sessions of the commission or during the actual attendance of the same; nor to the necessary and actual expense incurred by any such member in the performance of his official duties as provided and set forth in this act. The commission shall employ a full-time executive director who shall receive a salary not less than seven thousand eight hundred dollars (\$7,800) and not to exceed nine thousand five hundred dollars (\$9,500) per year, as fixed by the commission. The commission shall employ such professional staff and full or part-time legal, stenographic and clerical assistance as shall be necessary to carry out the provisions of this act and fix the amount of their compensation: *Provided, however*, That the appointment and compensation of legal counsel shall be approved by the attorney general.

Sec. 4. Section 44-1004 of the General Statutes Supplement of 1959 is hereby amended to read as follows: Sec. 44-1004. The commission shall have the following functions, powers and duties:

(1) To establish and maintain its principal office in the city of Topeka, and such other offices elsewhere within the state as it may deem necessary.

(2) To meet and function at any place within the state.

(3) To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions of this act, and the policies and practices of the commission in connection therewith.

(4) To receive and investigate complaints alleging discrimination in employment because of race, religion, color, national origin or ancestry.

(5) To hold hearings, administer oaths, take the testimony of any person under oath, and, in connection therewith, to examine any books or papers relating to any matter under investigation or in question before the commission. No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which

he testifies or produces evidence, except that such person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. The immunity herein provided shall extend only to natural persons.

(6) To endeavor to eliminate prejudice among the various ethnic groups in this state and to further good will among such groups. The commission in co-operation with the state department of education shall prepare a comprehensive educational program designed for the students of the public schools of this state and for all other residents thereof, calculated, to emphasize the origin of prejudice against such groups, its harmful effects, and its incompatibility with American principles of equality and fair play.

(7) To create such advisory agencies and conciliation councils, local, regional, or state-wide, as in its judgment will aid in effectuating the purposes of this act, to study the problem of discrimination in all or specific fields or instances of discrimination because of race, religion, color, national origin or ancestry; to foster, through community effort or otherwise, good will, co-operation and conciliation among the groups and elements of the population of this state, and to make recommendations to the commission for the development of policies and procedures, and for programs of formal and informal education, which the commission may recommend to the appropriate state agency. Such advisory agencies and conciliation councils shall be composed of representative citizens serving without pay. The commission may itself make the studies and perform the acts authorized by this paragraph. It may, by voluntary conferences with parties in interest, endeavor by conciliation and persuasion to eliminate discrimination in all the stated fields and to foster good will and co-operation among all elements of the population of the state.

(8) To accept contributions from any person to assist in the effectuation of this section and to seek and enlist the co-operation of private, charitable, religious, labor, civic and benevolent organizations for the purposes of this section.

(9) To issue such publications and such results of investigation and research as in its judgment will tend to promote good will and minimize or eliminate discrimination because of race, religion, color, national origin or ancestry.

(10) To render each year to the governor

and to the state legislature a full written report of all its activities and of its recommendations.

(11) To adopt an official seal.

Sec. 5. It shall be an unlawful employment practice: (a) For an employer, because of the race, religion, color, national origin or ancestry of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual or to otherwise discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

(b) For a labor organization, because of the race, religion, color, national origin or ancestry of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(c) For any employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or membership or to make any inquiry in connection with prospective employment or membership, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin or ancestry, or any intent to make any such limitation, specification or discrimination, unless based on a bona fide occupational qualification.

(d) For any employer, employment agency or labor organization to discharge, expel or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act.

(e) For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

Sec. 6. Section 44-1005 of the General Statutes Supplement of 1959 is hereby amended to read as follows: Sec. 44-1005. Any person claiming to be aggrieved by an alleged unlawful employment practice may, by himself or by his attorney-at-law, make, sign, and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of, and which shall

set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of whom, refuse or threaten to refuse to co-operate with the provisions of this act, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint by an aggrieved individual, or by the attorney general, the commission shall designate one of the commissioners to make, with the assistance of the commissioner's staff, prompt investigation of the alleged act of discrimination. If such commissioner shall determine after such investigation that no probable cause exists for crediting the allegations of the complaint, he shall, within ten (10) days from such determination, cause to be issued and served upon the complainant written notice of such determination.

If such commissioner after such investigation, shall determine that probable cause exists for crediting the allegations for the complaint, the said commissioner or such other commissioner as the commission may designate, shall immediately endeavor to eliminate the unlawful employment practice complained of by conference and conciliation. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors.

In case of failure so to eliminate such practice, or in advance thereof, if in the judgment of the commissioner or the commission circumstances so warrant, the said commissioner or the commission shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before the commission at a time not less than ten (10) days after the service of said notice. The place of such hearing shall be in the county where respondent is doing business and the acts complained of occurred.

The case in support of the complaint shall be presented before the commission by one of its attorneys or agents, or by private counsel, if any, of the complainant, and the commissioner who shall have previously made the investigation shall not participate in the hearing except as a

witness, nor shall he participate in the deliberations of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence.

The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. The complainant shall appear at such hearing in person, with or without counsel, and submit testimony. Any individual or individuals filing such a complaint must appear in person at such hearing. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall be bound by the rules of evidence prevailing in courts of law or equity, and only relevant evidence of reasonable probative value shall be received. Reasonable examination and cross-examination shall be permitted. All parties shall be afforded opportunity to submit briefs prior to adjudication. The testimony taken at the hearing shall be under oath and be transcribed.

If, upon all the evidence in the hearing, the commission shall find a respondent has engaged in or is engaging in any unlawful employment practice as defined in this act, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and to take such affirmative or other action, including the hiring, reinstatement with or without back pay, or upgrading of employees admission or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful employment practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent.

A copy of its order shall be delivered in all cases by the commission to the complainant, to the respondent, to the attorney general, and to such other public officers as the commission may deem proper.

The commission shall, except as otherwise herein provided, establish rules of practice to

govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Said rules shall be available, upon written request, within thirty (30) days after the date of adoption.

Any complaint filed pursuant to this act must be so filed within six (6) months after the alleged act of discrimination.

Sec. 7. Any party being dissatisfied with any order or decision of the commission may, within ten (10) days from the date of the service of such order or decision, apply for a rehearing in respect to any matter determined therein; the application shall be granted or denied by the commission within ten (10) days from the date same shall be filed, and if the rehearing be not granted within ten (10) days it shall be taken as denied. If a rehearing be granted the matter shall be determined by the commission within thirty (30) days after the same shall be submitted. No cause of action arising out of any order or decision of the commission shall accrue in any court to any party unless such party shall make application for a rehearing as herein provided. Such application shall set forth specifically the ground or grounds on which the applicant considers such order or decision to be unlawful or unreasonable. No party shall, in any court, urge or rely upon any ground not set forth in said application. An order made after a rehearing abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision.

Sec. 8. The attorney general or county attorney, at the request of the commission, may secure enforcement of the order of the commission by the district court of the county where the unlawful employment practice shall have occurred or where any person required in the order to cease and desist from an unlawful employment practice or to take any affirmative action resides or transacts business, through mandamus or injunction in appropriate cases, or by action to compel the specific performance of the order. Such proceeding shall be initiated by the filing of a petition in such court, together with a transcript of the record upon the hearing before the commission, and issuance and service of a copy of said petition as in civil actions. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings an order or

decree, enforcing, modifying, and enforcing, as so modified, or setting aside in whole or in part, the order of the commission.

The attorney general, county attorney or any person aggrieved by an order made by the commission may obtain judicial review thereof in the said court by filing with the clerk of said court within thirty (30) days from the date of service of the order, a written appeal praying that such order be modified or set aside. The appeal shall certify that notice in writing of the appeal, with a copy of the appeal, has been given to all parties who appeared before the commission at their last known address, and to the commission by service at the office of the commission at Topeka. The evidence presented to the commission, together with its findings and the order issued thereon, shall be certified by the commission to said district court as its return. No order of the commission shall be superseded or stayed during the proceeding on the appeal unless the district court shall so direct.

No objection that has not been urged before the commission shall be considered by the court unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

The court shall hear the appeal with or without a jury and the court may, in its discretion, permit any party or the commission to submit additional evidence on any issue. Said appeal shall be heard and determined by the court as expeditiously as possible. After hearing, the court may affirm the adjudication. If the adjudication by the commission is not affirmed, the court may set aside or modify it, in whole or in part, or may remand the proceedings to the commission for further disposition in accordance with the order of the court.

The commission's copy of the testimony shall be available at all reasonable times to all parties for examination without cost, and for the purpose of judicial review of the order. The review shall be heard on the record without requirement of printing.

The commission shall be deemed a party to the review of any order by the court.

The jurisdiction of the district court of the proper county as aforesaid shall be exclusive and its final order or decree shall be subject to review by the supreme court as in other cases upon appeal within thirty (30) days of the filing of such decision.

Sec. 9. Every employer, employment agency and labor union subject to this act, shall keep posted in a conspicuous place or places on his premises a notice or notices to be prepared or approved by the commission, which shall set forth excerpts of this act and such other relevant information which the commission shall deem necessary to explain the act.

Sec. 10. Any person, employer, labor organization or employment agency, who or which shall willfully resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of duty under this act, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not more than one (1) year, or by a fine of not more than five hundred dollars

(\$500), or by both such fine and imprisonment; but procedure for the review of the order shall not be deemed to be such willful conduct.

Sec. 11. This act shall not apply to any member of or adherent to a religious creed whose tenets or practices include a refusal to recognize the flag of the United States of America or a refusal to serve in the armed forces of the United States of America.

Sec. 12. Sections 44-1001, 44-1002, 44-1003, 44-1004, 44-1005 and 44-1008 of the General Statutes Supplement of 1959 are hereby repealed.

Sec. 13. This act shall take effect and be in force from and after its publication in the statute book.

EMPLOYMENT, PUBLIC ACCOMMODATIONS Anti-Discrimination Law—Idaho

Chapter 309 of the 1961 Acts of the Idaho legislature, approved March 13, 1961, prohibits discrimination in employment and public accommodations because of race, creed, color or national origin. All persons are declared to be entitled to "full enjoyment" of public accommodations, which is defined as including the right "... to purchase any service, commodity or article ... without acts directly or indirectly causing persons of any particular race, creed or color, to be treated as not welcome, accepted, desired or solicited."

AN ACT prohibiting discrimination in employment and in public accommodations because of race, creed, color or national origin; declaring public policy; defining terms; making violations a misdemeanor.

Be It Enacted by the Legislature of the State of Idaho:

Section 1. The right to be free from discrimination because of race, creed, color, or national origin is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(1) The right to obtain and hold employment without discrimination.

(2) The right to the full enjoyment of any of the accommodations, facilities or privileges of any place of public resort, accommodation, assemblage or amusement.

Section 2. Terms used in this chapter shall have the following definitions:

(a) "Every person" shall be construed to include any owner, lessee, proprietor, manager, agent or employee whether one or more natural persons, partnerships, associations, organizations, corporations, cooperatives, legal representatives, trustees, receivers, of this state and its political subdivisions, boards and commissions, engaged in or exercising control over the operation of any place of public resort, accommodation, assemblage or amusement.

(b) "Deny" is hereby defined to include any act which directly or indirectly, or by subterfuge, by a person or his agent or employee, results or is intended or calculated to result in whole or in part in any discrimination, distinction, restriction, or unequal treatment or the requiring of any person to pay a larger sum than the uniform rates charged other persons, or the

refusing or withholding from any person the admission, patronage, custom, presence, frequenting, dwelling, staying, or lodging in any place of public resort, accommodation, assemblage, or amusement except for conditions and limitations established by law and applicable alike to all persons, regardless of race, creed or color.

(c) "Full enjoyment of" shall be construed to include the right to purchase any service, commodity or article of personal property offered or sold on, or by, any establishment to the public, and the admission of any person to accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, without acts directly or indirectly causing persons of any particular race, creed or color, to be treated as not welcome, accepted, desired or solicited.

(d) "National origin" includes "ancestry."

(e) "Any place of public resort, accommodation, assemblage or amusement" is hereby defined to include, but not to be limited to any public place, licensed or unlicensed, kept for gain, hire or reward, or where charges are made for admission, service, occupancy or use of any property or facilities, whether conducted for the entertainment, housing or lodging of transient guests, or for the benefit, use or accommodation of those seeking health, recreation or rest, or for the sale of goods and merchandise, or for the rendering of personal services, or for public conveyance or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports or recrea-

tion of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation or public purposes, or public halls, public elevators and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or any educational institution wholly or partially supported by public funds, or schools of special instruction, or nursery schools, or day care centers or children's camps; nothing herein contained shall be construed to include, or apply to, any institute, bona fide club, or place of accommodation, which is by its nature distinctly private provided that where public use is permitted that use shall be covered by this section; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution; and the right of a natural parent in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed.

Section 3. Every person who denies to any other person because of race, creed, color, or national origin the right to work: (a) by refusing to hire, (b) by discharging, (c) by barring from employment, or (d) by discriminating against such person in compensation or in other terms or conditions of employment; and every person who denies to any other person because of race, creed, color or national origin, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor.

EMPLOYMENT, PUBLIC ACCOMMODATIONS Anti-Discrimination Law—Nevada

Chapter 364 of the 1961 Acts of the Nevada legislature, approved April 6, 1961, declares that the public policy of the state favors the protection of the right of all persons reasonably to seek, obtain, and hold employment and housing accommodations, and reasonably to seek and be granted services in places of public accommodation, without discrimination, distinction or restriction because of race, religious creed, color, national origin or ancestry. A Com-

mission on Equal Rights for Citizens is created, with authority, including subpoena powers, to investigate conditions and incidents of discrimination, to suggest solutions, and to recommend further statutory procedures.

AN ACT to amend Title 19 of NRS, relating to miscellaneous matters related to government and public affairs, by creating a new chapter relating to the Nevada commission on equal rights of citizens, its composition, powers and duties; making an appropriation from the general fund in the state treasury for the support of the commission for the fiscal years 1961-1963; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

Section 1. Title 19 of NRS is hereby amended by adding thereto a new chapter to consist of the provisions set forth in sections 2 to 9, inclusive, of this act.

Section 2.1. It is hereby declared to be the public policy of the State of Nevada to protect the welfare, prosperity, health and peace of all the people of the state, and to foster the right of all persons reasonably to seek, obtain and hold employment and housing accommodations, and reasonably to seek and be granted services in places of public accommodation without discrimination, distinction or restriction because of race, religious creed, color, national origin or ancestry.

2. It is recognized that the people of this state should be afforded full and accurate information concerning actual and alleged practices of discrimination and acts of prejudice, and that such information may provide the basis for formulating statutory remedies of equal protection and opportunity for all citizens in this state.

Sec. 3. As used in this chapter:

1. "Commission" means the Nevada commission on equal rights of citizens.

2. "Member" means a member of the Nevada commission on equal rights of citizens.

Sec. 4. 1. The Nevada commission on equal right of citizens consisting of 5 members is hereby created.

2. The members shall be appointed by the governor and shall serve at the pleasure of the governor.

3. Vacancies shall be filled by appointment by the governor.

4. Members shall serve without compensation, but they shall be entitled to receive the per diem expense allowances and travel expenses as provided by law.

Sec. 5. The members of the commission shall be representative of the religious, racial and ethnic groups in the state.

Sec. 6. 1. The governor shall appoint a chairman of the commission and the members shall elect a secretary from the membership of the commission.

2. The commission shall meet at least twice a year on the call of the chairman at a place designated by the chairman or a majority of the commission.

Sec. 7. The commission shall:

1. Foster mutual understanding and respect among all racial, religious and ethnic groups in the State of Nevada.

2. Aid in securing equal health and welfare services and facilities for all the residents of the State of Nevada without regard to race, religion or nationality.

3. Study and investigate problems arising between groups in the State of Nevada which may result in tensions, discrimination or prejudice because of race, color, creed, national origin or ancestry, and formulate and carry out programs of education and disseminate information with the object of discouraging and eliminating any such tensions, prejudices or discrimination.

4. Investigate any complaints of discrimination, tensions or prejudice filed with or referred to the commission.

5. Secure the cooperation of various racial, religious, nationality and ethnic groups, veterans' organizations, labor organizations, business and industry organizations and fraternal, benevolent and service groups, in educational campaigns devoted to the need for eliminating group prejudice, racial or area tensions, intolerance or discrimination.

6. Cooperate with and seek the cooperation of federal and state agencies and departments in carrying out projects within their respective authorities to eliminate intergroup tensions and to promote intergroup harmony.

7. Have the power to accept gifts or bequests of personal property and may use the same to carry out the objects and purposes of this chapter.

Sec. 8. 1. The commission shall receive and investigate complaints and initiate its own investigation of tensions, practices of discrimination and acts of prejudice against any person or group because of race, color, creed, national origin or ancestry, and may conduct private or public hearings with regard thereto.

2. The commission, after the completion of any hearing, shall make a report in writing to the governor setting forth the facts found by the commission and the commission's recommendations. The commission shall use its best efforts to bring about compliance with its recommendations.

3. The commission may subpoena witnesses and require the production of any evidence relevant to any hearing conducted by the commission.

Sec. 9. The commission shall, on or before

January 15, 1963, and every January 15 of each odd-numbered year thereafter, prepare and submit a report concerning its activities to the governor and the legislative counsel. The legislative counsel shall cause such report to be made available to each senator and assemblyman.

Sec. 10. 1. For the fiscal year beginning July 1, 1961, and ending June 30, 1962, there is hereby appropriated from the general fund in the state treasury for the support of the Nevada commission on equal rights of citizens the sum of \$2,500. On July 1, 1962, any unexpended balance of the appropriation made in this subsection shall revert to the general fund in the state treasury.

2. For the fiscal year beginning July 1, 1962, and ending June 30, 1963, there is hereby appropriated from the general fund in the state treasury for the support of the Nevada commission on equal rights of citizens the sum of \$2,500. On July 1, 1963, any unexpended balance of the appropriation made in this subsection shall revert to the general fund in the state treasury.

COMMISSIONS

Establishment—West Virginia

House Bill 115 of the 1961 session of the West Virginia legislature, approved March 11, 1961, creates a Human Rights Commission to "encourage and endeavor to bring about mutual understanding and respect among all racial, religious and ethnic groups within the state and . . . strive to eliminate all discrimination in employment and places of public accommodation by virtue of race, creed or religious belief." The commission is authorized to cooperate with other governmental agencies similarly occupied, to enlist the assistance of private groups in promoting tolerance, to act as conciliator in matters of discrimination in employment and public accommodations, to receive complaints and hold hearings on allegations of discrimination, to promote research and study in human rights, and to recommend policies and procedures to the governor and legislature. The Act specifically provides that no decision of the commission in a conciliation attempt shall be binding upon the parties.

AN ACT to amend chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article eleven, relating to the creation and establishment of the West Virginia human rights commission and providing for its personnel, powers, functions and services.

Be it enacted by the Legislature of West Virginia:

That chapter five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article eleven, to read as follows:

Article II. Human Rights Commission.

Section 1. *Human Rights Commission Created; Status, Powers and Objects*—A West Virginia human rights commission is hereby created and established in the state government. The commission shall have the powers and authority and shall perform the functions and services as in this article prescribed and as otherwise provided by law. The commission shall encourage and endeavor to bring about mutual understanding and respect among all racial, religious and ethnic groups within the state and shall strive to eliminate all discrimination in employment and places of public accommodation by virtue of race, creed or religious belief. Unless the context clearly requires another meaning or reference, the word "commission" as used in this article shall be construed to mean and to refer to the West Virginia human rights commission.

Section 2. *Commission Composition; Terms; Oath of Office; Expenses*.—The commission shall be composed of nine members, all residents and citizens of the state of West Virginia and broadly representative of the several racial, religious and ethnic groups residing within the state, to be appointed by the governor by and with the advice and consent of the Senate. Not more than five members of the commission shall be members of the same political party and at least one member but not more than three members shall be from any one congressional district.

Members of the commission shall be appointed for terms of three years commencing on the first day of July of the year of their appointments, except that the nine members first appointed hereunder shall be appointed for terms of from one to three years, respectively, so that the terms of three members of the commission will expire on the thirtieth day of June of each succeeding year thereafter. Upon the expiration of the initial terms, all subsequent appointments shall be for terms of three years each, except that appointments to fill vacancies shall be for the unexpired term thereof. Members shall be eligible for reappointment. Before assuming and performing any duties as a member of the commission, each commission member shall take and subscribe to the official oath prescribed by section five of article four of the constitution of West Virginia, which executed oath shall be filed in the office of the secretary of state.

No member of the commission shall receive any salary or compensation for his services as such, but each member shall be reimbursed for his reasonable and necessary travel expenses incurred in performance of his commission services.

Section 3. *Commission Organization and Personnel*.—As soon as practical after the first day of July following creation of the commission, the governor shall call a meeting thereof to be convened at the state capitol. The commission shall at the meeting organize by electing one of its members as chairman of the commission and one as vice-chairman thereof for a term of one year or until their successors are elected and qualified. Annually thereafter, as soon as practical after the first day of July, the commission shall elect a chairman and vice-chairman from its membership and such other officers as may be found necessary and proper for its effective organization.

When organized, the commission shall select an executive director who shall serve at the will and pleasure of the commission. The executive director shall serve as secretary of the commission. The executive director shall have a college degree. He shall be selected with particular reference to his training, experience and qualifications for the position and shall be paid an annual salary, payable in monthly installments, from any appropriations made therefor. The commission, upon recommendation of the executive director, may employ, prescribe the duties for, and fix the salaries and compensation within available appropriations of such personnel as may be necessary for the effective and orderly performance of the functions and services of the commission.

The commission shall equip and maintain its offices at the state capitol and shall hold its annual organizational meeting thereat. The commission may hold other meetings during the year at such times and places within the state as may be found necessary and proper in the discharge of its duties. Any five members of the commission shall constitute a quorum for the transaction of business. Minutes of its meetings shall be kept by its secretary.

The executive director and other commission personnel shall be reimbursed for necessary and reasonable travel and subsistence expenses incurred in performance of commission services upon presentation of properly verified expense accounts as prescribed by law.

Section 4. Commission Powers; Functions; Services. — The commission is hereby authorized and empowered:

(a) To cooperate and work with federal, state and local government officers, units, activities and agencies in the promotion and attainment of more harmonious understanding and greater equality of rights between and among all racial, religious and ethnic groups in this state;

(b) To enlist the cooperation of racial, religious and ethnic units, community and civic organizations, industrial and labor organizations and other identifiable groups of the state in programs and campaigns devoted to the advancement of tolerance, understanding and the equal protection of the laws for all groups and peoples;

(c) To act as conciliator in matters of employment and places of public accommodation involving race, color, religion, national origin or ancestry, but no decision of the commission shall be binding upon any parties to the conciliation;

(d) To receive and consider complaints involving employment and places of public accommodation and to initiate its own consideration of any situations, circumstances or problems, including therein any racial, religious or ethnic group tensions, prejudice, disorder or discrimination reported or existing within the state relating to employment and places of public accommodation.

(e) To hold and conduct public and private hearings on complaints, matters and questions before the commission and, in connection therewith, to

(1) Administer oaths, take the testimony of any person under oath, and make reimbursement for travel and other reasonable and necessary expenses in connection with such attendance;

(2) Compile hearing records and furnish copies of the whole or any parts thereof to the governor, the Legislature and such other governmental officials and agencies as may be concerned therewith;

(3) Furnish copies of public hearings records to interested parties involved therein upon their payment of the reasonable costs thereof to the commission;

(4) Delegate to the executive director, or to any five members of the commission the power and authority to hold and conduct the hearings, as herein provided, but all decisions and action

growing out of or upon any such hearings shall be reserved for determination by the commission;

(f) To encourage, promote and conduct studies and research projects in matters and questions involving and relating to human rights and to compile and make public reports thereon;

(g) To recommend to the governor and Legislature policies, procedures, practices and legislation in matters and questions affecting human rights;

(h) To delegate to its executive director and to such other investigative and research personnel as it may employ such powers, duties and functions as may be necessary and expedient in carrying out the objectives and purposes of this article;

(i) To prepare a written report on its work, functions and services for each year ending on the thirtieth day of June and to deliver copies thereof to the governor on or before the first day of December next thereafter;

(j) To do all other acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by the provisions of this article, including the promulgation of rules and regulations implementing the powers and authority hereby vested in the commission.

(k) Notwithstanding any other provisions of this article, any person called as a witness before the commission may, in that person's discretion, demand either a public or private hearing.

Section 5. Assistance to Commission; Legal Services. — The commission may call upon other officers, departments and agencies of the state government to assist in its hearings, programs and projects. The attorney general of the state shall render legal services to the commission upon request made by the commission or by the chairman or the executive director thereof.

Section 6. Construction; Separable Provisions. — The provisions of this article shall be liberally construed to accomplish the objectives and purposes hereof. If any provision of this article be held invalid or unconstitutional by any court of competent jurisdiction, such invalidity or unconstitutionality shall not affect or invalidate the other provisions hereof, all of which are declared and shall be construed to be separate and separable.

HOUSING

Publicly-Assisted—Minnesota

Act _____ of the 1961 session of the Minnesota legislature, approved April 14, 1961, amends that state's Fair Employment Practices Act so as to prohibit the refusal to sell, rent, lease, or otherwise deny or withhold from any person or group any real property because of race, color, creed, religion, or national origin. The name of the state Fair Employment Practices Commission is changed to State Commission Against Discrimination, and its duties are redefined. See 2 Race Rel. L. Rep. 1157 (1957). The act is set out below, with new material printed in italics, and parts of the old act now omitted printed in capitals within parentheses.

AN ACT Relating to Discrimination Because of Race, Color, Creed, Religion, or National Origin; Creating and Establishing a State Commission Against Discrimination; Amending Minnesota Statutes 1957, Section 363.01, Subdivisions 3 and 9, and by Adding Subdivisions Thereto; Section 363.02; Section 363.03; Section 363.04, Subdivision 1; Section 363.05, Subdivision 1; Section 363.06; Section 363.07, Subdivision 4, 5, 8, 9, and 10; Section 363.08, Subdivision 3; Section 363.09; Section 363.12; and Section 363.13.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Minnesota Statutes 1957, Section 363.01, Subdivision 3, is amended to read: Subd. 3. [COMMISSION.] "Commission" means the State (FAIR EMPLOYMENT PRACTICES) Commission Against Discrimination.

Sec. 2. Minnesota Statutes 1957, Section 363.01, is amended by adding subdivisions:

Subd. 1 [PUBLICLY ASSISTED HOUSING.] "Publicly assisted housing accommodation" means a housing accommodation that is, or is located in a building:

(a) Situated on land owned or assembled into a parcel for housing accommodations by a governmental body 52B;

(b) Upon which a commitment by a governmental body to guarantee or insure an acquisition loan is outstanding; or

(c) Subject to an outstanding secured or unsecured loan made, guaranteed, or insured by a governmental body for the purpose of financing the acquisition, construction, rehabilitation, repair, or maintenance of the building.

Subd. 2. [REAL PROPERTY.] "Real property" includes real estate, lands, tenements, and hereditaments, corporeal and incorporeal.

Subd. 53B. [REAL ESTATE BROKER OR

SALESMAN.] "Real estate broker or salesman" means, respectively, a real estate broker as defined by Minnesota Statutes 1957, Section 82.01, Subdivision 4, and a real estate salesman as defined by Minnesota Statutes 1957, Section 82.01, Subdivision 5.

Sec. 3. Minnesota Statutes 1957, Section 363.01, Subdivision 9, as amended to read:

Subd. 9. [UNFAIR DISCRIMINATORY PRACTICES.] "Unfair (EMPLOYMENT) discriminatory practice" means any act described in section 363.03.

Sec. 4. Minnesota Statutes 1957, Section 363.02, is amended to read:

363.02 [EXCEPTIONS.] *Subdivision 1. [EMPLOYMENT.] (THIS CHAPTER DOES) The provisions of section 363.03, subdivision 1, shall not apply to:*

(1) The employment of any individual

(a) by his parent, grandparent, spouse, child, or grandchild, or

(b) in the domestic service of any person;

(2) A person who regularly employs fewer than eight individuals, excluding individuals described in clause (1); or

(3) A religious or fraternal corporation, association, or society, with respect to qualifications based on religion, when religion shall be a bona fide occupational qualification for employment.

Subd. 2. [HOUSING.] (1) *The provisions of section 363.03, subdivision 2, shall not apply to:*

(a) *The rental of a portion of a dwelling containing accommodations for two families, one of which is occupied by the owner, or (b) the rental by an owner of a one-family accommodation in which he resides of a room or rooms in such accommodation to another person or persons, or (c) the rental, lease or sale of a one-family dwelling, owner occupied, not defined as a publicly assisted housing accommodation.*

Sec. 5. Minnesota Statutes 1957, Section 363.03, is amended to read:

363.03 [UNFAIR DISCRIMINATORY PRACTICES.] *Subdivision 1.* [EMPLOYMENT.] Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race, color, creed, religion or national origin,

(a) to deny full and equal membership rights to an applicant for membership or to a member;

(b) to expel a member from membership;

(c) to discriminate against an applicant for membership or a member with respect to his hire, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment; or

(d) to fail to classify properly, or refer for employment or otherwise to discriminate against a member;

(2) For an employer, because of race, color, creed, religion, or national origin,

(a) to refuse to hire an applicant for employment; or

(b) to discharge an employee; or

(c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment;

(3) For an employment agency, because of race, color, creed, religion, or national origin,

(a) to refuse or fail to accept, register, classify properly, or refer for employment or otherwise to discriminate against an individual; or

(b) to comply with a request from an employer for referral of applicants for employment if the request indicates directly or indirectly that the employer fails to comply with the provisions of this chapter;

(4) For an employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against a person because that person has opposed any practice forbidden under this chapter or has filed a complaint, testified, or assisted in any proceeding under this chapter;

(5) For a person intentionally to aid, abet, incite, compel, or coerce another person to engage in any of the practices forbidden by this chapter;

(6) For a person intentionally to attempt to aid, abet, incite, compel, or coerce another

person to engage in any of the practices forbidden by this chapter;

(7) For any person, employer, labor organization or employment agency to willfully resist, prevent, impede, or interfere with the commission, the board of review, or any of its members or representatives in the performance of duty under this chapter;

(8) For an employer, employment agency, or labor organization, before an individual is employed by an employer or admitted to membership in a labor organization, to

(a) require the applicant to furnish information that pertains to the applicant's race, color, creed, religion or national origin, unless, for the purpose of national security, information pertaining to the national origin of the applicant is required by the United States, this state or a political subdivision or agency of the United States or this state; or

(b) cause to be printed or published a notice or advertisement that relates to employment or membership and discloses a preference, limitation, specification, or discrimination based on race, color, creed, religion or national origin.

Subd. 2. [REAL PROPERTY.] It is an unfair discriminatory practice:

(1) For an owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease any real property, or any agent of any of these

(a) to refuse to sell, rent, or lease or otherwise deny to or withhold from any person or group of persons any real property because of the race, color, creed, religion, or national origin of such person or group of persons;

(b) to discriminate against any person or group of persons because of the race, color, creed, religion, or national origin of such person or group of persons in the terms, conditions or privileges of the sale, rental or lease of any real property or in the furnishing of facilities or services in connection therewith; or,

(c) in any transaction involving real property, to print, circulate or post or cause to be printed, circulated, or posted any advertisement or sign, or use any form of application for the purchase, rental or lease of real property, or make any record or inquiry in connection with the prospective purchase, rental, or lease of real property which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, color, creed, religion, or national origin or any

intent to make any such limitation, specification, or discrimination,

(2) For a real estate broker, real estate salesman, or employee or agent thereof

(a) to refuse to sell, rent, or lease or to offer for sale, rental, or lease any real property to any person or group of persons or to negotiate for the sale, rental, or lease of any real property to any person or group of persons because of the race, color, creed, religion, or national origin of such person or group of persons, or represent that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or otherwise deny or withhold any real property or any facilities of real property to or from any person or group of persons because of the race, color, creed, religion, or national origin of such person or group of persons;

(b) to discriminate against any person because of his race, color, creed, religion, or national origin in the terms, conditions or privileges of the sale, rental, or lease of real property or in the furnishing of facilities or services in connection therewith; or

(c) to print, circulate, or post or cause to be printed, circulated, or posted any advertisement or sign, or use any form of application for the purchase, rental, or lease of any real property or make any record or inquiry in connection with the prospective purchase, rental, or lease of any real property, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, creed, religion, or national origin or any intent to make any such limitation, specification, or discrimination;

(3) For a person, bank, banking organization, mortgage company, insurance company, or other financial institution or lender to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair, or maintenance of any real property or any agent or employee thereof,

(a) to discriminate against any person or group of persons because of the race, color, creed, religion, or national origin of such person or group of persons or of the prospective occupants or tenants of such real property in the granting, withholding, extending, modifying or renewing, or in the rates, terms, conditions, or privileges of any such financial assistance or in the extension of services in connection therewith;

(b) to use any form of application for such financial assistance or make any record or inquiry in connection with applications for such

financial assistance which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, color, creed, religion, or national origin or any intent to make any such limitation, specification, or discrimination.

(4) For any person

(a) to engage in any economic reprisal against any other person because that person has opposed any practice forbidden under this act or has filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this act;

(b) intentionally to aid, abet, incite, compel, or coerce any other person to engage in any of the practices forbidden by this act;

(c) to wilfully obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to resist, prevent, impede, or interfere with the commission, the board of review, or any of its members or representatives in the performance of duty under this act; or

(d) to attempt directly or indirectly to commit any of the practices forbidden by this act.

Sec. 6. Minnesota Statutes 1957, Section 363.04, Subdivision 1, is amended to read:

363.04 [STATE COMMISSION AGAINST DISCRIMINATION.] Subdivision 1. [CREATION, MEMBERSHIP.] There is created a State (FAIR EMPLOYMENT PRACTICES) Commission Against Discrimination, to consist of up to nine members, with at least one from each congressional district of the state of Minnesota; and at least one of whom shall be an attorney at law, appointed by the governor with the advice and consent of the senate, for a term of five years to serve until a successor is appointed and qualified. The chairman shall be designated by the governor.

Sec. 7. Minnesota Statutes 1957, Section 363.05, Subdivision 1, is amended to read:

363.05 [DUTIES OF COMMISSION.] Subdivision 1 [FORMULATION OF POLICIES.] The commission shall formulate policies to effectuate the purposes of this chapter and shall:

(1) establish and maintain a principal office in St. Paul, and any other necessary branch offices at any location within the state;

(2) meet and function at any place within the state;

(3) appoint an executive director to serve at the pleasure of the commission and fix his compensation and prescribe his duties;

(4) employ such attorneys, clerks and other employees and agents as it may deem necessary, to fix their compensation and prescribe their duties;

(5) to the extent permitted by federal law and regulation, utilize the records of the department of employment security of the state when necessary to effectuate the purposes of this chapter;

(6) obtain upon request and utilize the services of all state governmental departments and agencies;

(7) adopt suitable rules and regulations for effectuating the purposes of this chapter;

(8) issue, receive, and investigate complaints alleging discrimination (IN EMPLOYMENT) because of race, color, creed, religion or national origin;

(9) subpoena witnesses, administer oaths, and take testimony relating to the case before the commission, and require the production for examination of any books or papers relative to any matter under investigation or in question before the commission;

(10) attempt, *by means of education, conference, conciliation, and persuasion* to eliminate unfair (EMPLOYMENT) *discriminatory* practices (BY MEANS OF EDUCATION, CONFERENCE, CONCILIATION, AND PERSUASION) *in all types of employment and housing accommodations as being contrary to the public policy of the state as stated in section 363.12;*

(11) conduct research and study discriminatory (EMPLOYMENT AND LABOR) practices based on race, color, creed, religion, or national origin;

(12) publish the results of research and study of discriminatory (EMPLOYMENT AND LABOR) practices based on race, color, creed, religion, or national origin when in the judgment of the commission it will tend to eliminate such discrimination;

(13) develop and recommend programs of formal and informal education designed to promote good will; and may make recommendations to agencies and officers of state or local subdivisions of government in aid of such policies and purposes in eliminating discriminatory (EMPLOYMENT AND LABOR) practices based on race, color, creed, religion, or national origin; and

(14) make a written report of the activities of the commission to the governor each year and to the legislature at each session.

Sec. 8. Minnesota Statutes 1957, Section 363.06, is amended to read:

363.06 [GRIEVANCES.] Subdivision 1. [COMPLAINT FILING.] Any person aggrieved by a violation of this chapter may file by himself, or his agent, or attorney a signed complaint with the commission, stating the name and address of the person alleged to have committed an unfair (EMPLOYMENT) *discriminatory* practice, setting out the details of the practice complained of and any other information required by the commission. Any employer whose employees, or some of them, or any labor union whose members, or some of them, refuse or threaten to refuse to cooperate with the provisions of this chapter, may file with the commission a signed complaint asking for assistance by conciliation or other remedial action.

Subd. 2. [COMPLAINT, ISSUANCE BY COMMISSION.] Whenever the commission has reason to believe that a person is engaging in unfair (EMPLOYMENT) *discriminatory* practice, the commission may issue a complaint.

Subd. 3. [TIME FOR FILING COMPLAINT.] A complaint of an unfair (EMPLOYMENT) *discriminatory* practice must be filed within six months after the occurrence of the practice.

Subd. 4. [INQUIRY INTO COMPLAINT.] When a complaint has been filed or issued, the commission shall promptly inquire into the truth of the allegations of the complaint. If after the inquiry the commission determines that there is probable cause for believing that an unfair (EMPLOYMENT) *discriminatory* practice exists, the commission shall immediately endeavor to eliminate the unfair (EMPLOYMENT) *discriminatory* practice through education, conference, conciliation, and persuasion. If the commission determines that there is no probable cause for believing that an unfair (EMPLOYMENT) *discriminatory* practice exists, the commission shall dismiss the complaint.

Subd. 5. [ATTEMPTS TO ELIMINATE UNFAIR PRACTICES.] The commission, in complying with subdivision 4, shall endeavor to eliminate the unfair (EMPLOYMENT) *discriminatory* practice at the place where the practice occurred, or the respondent resides or has his principal place of business.

Subd. 6. [PUBLICATION OF ACCOUNTS OF CASES.] The commission may publish an account of a case in which the complaint has been dismissed or the terms of settlement of a case that has been voluntarily adjusted. Except

as provided in other sections of this chapter, the commission shall not disclose any information concerning its efforts in a particular case to eliminate an unfair (EMPLOYMENT) *discriminatory* practice through education, conference, conciliation and persuasion.

Sec. 9. Minnesota Statutes 1957, Section 363.07, Subdivision 4, is amended to read:

Subd. 4. [NOTICE TO GOVERNOR.] On failing to eliminate an unfair (EMPLOYMENT) *discriminatory* practice in the manner prescribed by section 363.06, the commission shall notify the governor in writing of that fact, and request him to appoint a board of review to conduct a public hearing in the case.

Sec. 10. Minnesota Statutes 1957, Section 363.07, Subdivision 5, is amended to read:

Subd. 5. [HEARINGS; POWERS.] The board shall conduct a hearing at a place designated by it within the county where the unfair (EMPLOYMENT) *discriminatory* practice occurred, or the respondent resides or has his principal place of business. It may subpoena witnesses, administer oaths, take testimony and require the production for examination of any books or papers relating to any matter under investigation or in question before the board. The board shall adopt and promulgate rules of practice to govern its hearings and it shall employ necessary assistants, fix their compensation, and prescribe their duties.

Sec. 11. Minnesota Statutes 1957, Section 363.07, Subdivision 8, is amended to read:

Subd. 8. [EVIDENCE RECEIVABLE.] The board of review shall not be bound by the strict rules of evidence that prevail in courts of law, but its findings must be based upon competent and substantial evidence. The board shall not receive in evidence any evidence pertaining to the efforts of the commission to eliminate the unfair (EMPLOYMENT) practice through education, conference, conciliation, or persuasion. Each witness at the hearing shall testify under oath. All testimony and other evidence submitted at the hearing shall be recorded and transcribed. The board, at the request of the complainant or respondent, shall provide a copy of the transcript of the hearing without charge.

Sec. 12. Minnesota Statutes 1957, Section 363.07, Subdivision 9, is amended to read:

Subd. 9. [FINDING OF GUILTY.] If the board of review finds that the respondent has

engaged in an unfair (EMPLOYMENT) *discriminatory* practice, it shall make findings and shall issue an order directing the respondent to cease and desist from the unfair (EMPLOYMENT) *discriminatory* practice found to exist and to take such other affirmative action as in the judgment of the board will effectuate the purposes of this chapter and shall serve the order on the respondent personally, and the commission and the complainant by registered mail.

Sec. 13. Minnesota Statutes 1957, Section 363.07, Subdivision 10, is amended to read:

Subd. 10. [FINDING OF NOT GUILTY.] If the board finds that the respondent has not engaged in an unfair (EMPLOYMENT) *discriminatory* practice as alleged in the complaint, the board shall make findings of fact and conclusions of law and shall issue an order dismissing the complaint and shall serve it on the complainant personally, and the commission and the respondent by registered mail.

Sec. 14. Minnesota Statutes 1957, Section 363.08, Subdivision 3, is amended to read:

Subd. 3. [JURISDICTION.] A proceeding under this section shall be instituted in the district court for the judicial district in which an unfair (EMPLOYMENT) *discriminatory* practice covered by the order of the board occurred, or the respondent resides or has his principal place of business. *The proceeding in the district court shall be de novo and the person complained against shall be entitled at his request to a trial by jury.*

Sec. 15. Minnesota Statutes 1957, Section 363.09, is amended to read:

363.09 [VIOLATION OF ORDERS; CITATION FOR CONTEMPT.] Any person (EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY) or party who or which shall wilfully violate any order of the district court entered pursuant to a proceeding under this chapter shall be cited to the district court for and as being in contempt. Procedure for review of the order shall not be deemed to be such wilful conduct.

Any person (EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY,) or party found in a proceeding before the district court to be in contempt shall be punishable under Minnesota Statutes, Section 588.10, which provides for imprisonment for not more than six months, or a fine of not more than \$250, or both.

A proceeding under this section shall be com-

menced by the commission serving a notice of motion, and an order to show cause upon the respondent, and the complainant, and filing the same with the clerk of the district court of the county in which the aforementioned order is entered.

Sec. 16. Minnesota Statutes 1957, Section 363.12, is amended to read:

363.12 [DECLARATION OF POLICY.]

Subdivision 1. As a guide to the interpretation and application of this chapter, be it enacted that the public policy of this state is to foster (THE EMPLOYMENT OF) *equal employment and housing opportunity* for all individuals in this state in accordance with their fullest capacities, regardless of their race, color, creed, religion, or national origin, and to safeguard their rights to obtain and hold employment, *housing, and other real property* without discrimination. Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of

democracy. It is also the public policy of this state to protect (EMPLOYERS, LABOR ORGANIZATIONS, AND EMPLOYMENT AGENCIES) *all persons* from wholly unfounded charges of discrimination. This chapter is an exercise of the police power of this state in the interest of the public welfare.

Subd. 2. *The opportunity to obtain employment, housing, and other real estate without discrimination because of race, color, creed, religion, or national origin is hereby recognized as and declared to be a civil right.*

Sec. 17. Minnesota Statutes 1957, Section 363.13, is amended to read:

363.13 [TITLE.] This chapter shall be known as the Minnesota State Act (FOR FAIR EMPLOYMENT PRACTICES) *Against Discrimination.*

Sec. 18. [EFFECTIVE DATE.] *This act as it relates to housing becomes effective December 31, 1962.*

HOUSING

Real Estate Brokers—Massachusetts

Chapter 181 of the 1961 Acts of the Massachusetts legislature, approved March 6, 1961, provides for the suspension or revocation of the license of a real estate broker or salesman who fails to comply with an order of the Massachusetts Commission Against Discrimination.

AN ACT providing for the suspension or revocation of the license of a real estate broker or salesman who fails to comply with an order of the Massachusetts Commission against Discrimination.

Be it enacted, etc., as follows:

The first paragraph of section 87AAA of chapter 112 of the General Laws, as appearing in

section 2 of chapter 726 of the acts of 1957, is hereby amended by striking out, in line 28, the word "or", and by inserting after the word "inclusive", in line 30, the following:—; or (k) failed to comply with an order of the Massachusetts Commission against Discrimination, after administrative hearing and determination under section five of chapter one hundred and fifty-one B, which has become final.

PUBLIC ACCOMMODATIONS

Cemeteries—Washington

Chapter 103 of the 1961 Acts of the Washington legislature, approved March 15, 1961, amends that state's "Law Against Discrimination" [2 Race Rel. L. Rep. 461 (1957)] so as to include places "for the burial or other disposition of human remains" within the prohibition against discrimination because of "race, color, national origin or ancestry." Specifically excluded from the application of the Act is any "columbarium, crematory, mausoleum, and cemetery operated or maintained by a bona fide religious or sectarian institution." Sections two and three of the Act amend other statutes so as to add non-discriminatory operation of burying grounds as a prerequisite for qualifications for tax exemptions. Section 4 is a new section which provides that compliance with the Act shall not constitute breach of a pre-existing contract. Sections 2, 3 and 4 are reproduced below, with the new language in italics. Section 1 was changed only by the addition of the phrases quoted in the second sentence above.

AN ACT Relating to discrimination in the disposition of human remains; amending section 3, chapter 183, Laws of 1949 as amended by section 4, chapter 37, Laws of 1957, and RCW 49.60.040; amending section 3, chapter 33, Laws of 1899 and RCW 68.20.110; and amending section 84.36.020, chapter 15, Laws of 1961 (House Bill No. 6) and RCW 84.36.020.

Be It Enacted By The Legislature Of The State of Washington:

Section 2. Section 3, chapter 33, Laws of 1899 and RCW 68.20.110 are each amended to read as follows:

Such association shall be authorized to purchase or take by gift or devise, and hold land exempt from execution and from any appropriation to public purposes, for the sole purpose of a cemetery not exceeding eighty acres, which shall be exempt from taxation if intended to be used exclusively for burial purposes *without discrimination as to race, color, national origin or ancestry*, and in nowise with a view to profit of the members of such association: PROVIDED, That when the land already held by the association is all practically used then the amount thereof may be increased by adding thereto not exceeding twenty acres at a time. Such association may by its bylaws provide that a stated percentage of the moneys realized from the sale of lots, donations or other sources of revenue, shall constitute an irreducible fund, which fund may be invested in such manner or loaned upon such securities as the association or the trustees thereof may deem proper. The interest or income arising from the irreducible fund, provided for in any bylaws, or so much thereof as may be

necessary, shall be devoted exclusively to the preservation and embellishment of the lots sold to the members of such association, and where any bylaw has been enacted for the creation of an irreducible fund as herein provided for it cannot thereafter be amended in any manner whatever except for the purpose of increasing such fund. After paying for the land all the future receipts and income of such association subject to the provisions herein for the creation of an irreducible fund, whether from the sale of lots, from donations, rents or otherwise, shall be applied exclusively to laying out, preserving, protecting and embellishing the cemetery and the avenues leading thereto, and in the erection of such buildings as may be necessary or convenient for the cemetery purposes, and to paying the necessary expenses of the association. No debts shall be contracted in anticipation of any future receipts except for originally purchasing, laying out and embellishing the grounds and avenues, for which debts so contracted such association may issue bonds or notes and secure the same by way of mortgage upon any of its lands, excepting such lots as shall have been conveyed to the members thereof; and such association shall have power to adopt such rules and regulations as they shall deem expedient for disposing of and for conveying burial lots.

Section 3. Section 84.36.020 chapter . . ., Laws of 1961 (House Bill No. 6) and RCW 84.36.020 are each amended to read as follows:

The following property shall be exempt from taxation:

All lands used exclusively for public burying grounds or cemeteries *without discrimination as to race, color, national origin or ancestry*;

All churches, built and supported by dona-

tions, whose seats are free to all; and the ground, not exceeding five acres in area, upon which any cathedral or church of any recognized religious denomination is or shall be built, together with a parsonage. The area exempted shall in any case include all ground covered by the church and parsonage and the structures and ground necessary for street access, light, and ventilation, but the area of unoccupied ground exempt in such cases, in connection with both church and parsonage, shall not exceed the

equivalent of one hundred twenty by one hundred twenty feet. The parsonage need not be on land contiguous to the church property if the total area exempted does not exceed the areas above specified. To be exempt the grounds must be used wholly for church purposes.

NEW SECTION. Section 4. Nothing herein shall be construed to render any person or corporation liable for breach of preexisting contracts by reason of compliance by such person or corporation, with this act.

PUBLIC ACCOMMODATIONS

Definition—Indiana

Chapter 256 of the 1961 acts of the Indiana legislature, approved on March 9, 1961, redefines "public accommodations" for the purposes of that state's equal facilities law to include "any establishment, which caters or offers its services or facilities or goods to the general public. . . ." The Act also creates new procedures for complaints by aggrieved persons.

AN ACT to amend the Act concerning persons entitled to equal accommodations, being Chapter 47 of the Acts of 1885.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. Acts 1885, c. 47, s. 1 is amended to read as follows: Section 1. All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations in every place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed or color of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed or color, shall be a violation of this section. A place of public accommodation resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including but not limited to, public housing projects. For the purpose of this act, public housing projects shall mean those housing projects owned by the state government or any

agency or political subdivision of any of them. Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days or both.

SECTION 2. Acts 1885, c. 47, s. 2, is amended to read as follows: Section 2. Any person who believes that he has been denied equal accommodations as provided in Section 1 hereof, may bring a civil action in any court of competent jurisdiction in the county where said offense is alleged to have been committed. If such court enters judgment against defendant therein, it shall award damages to the plaintiff in an amount not less than twenty-five dollars (\$25) nor more than one hundred dollars (\$100), and shall tax court costs against the defendant. It is expressly provided, however, that should the plaintiff be awarded judgment against the defendant in such civil action, such judgment shall be a bar to any criminal proceeding based upon such denial by this defendant of equal accommodations to this plaintiff. A judgment against the defendant in a criminal proceeding, as provided in Section 1 hereof, shall be a bar to any civil action for this same denial by defendant of equal accommodations, to this plaintiff.

PUBLIC ACCOMMODATIONS

General—North Dakota

Act No. _____ of the 1961 session of the North Dakota legislature, approved on March 16, 1961, provides that all persons shall have equal rights in public places in the state, regardless of race, color, religion or national origin.

AN ACT to provide that all persons shall have equal rights in public places in North Dakota, and providing a penalty.

Be It Enacted By The Legislative Assembly Of The State Of North Dakota:

SECTION 1. (EQUAL RIGHTS IN PUBLIC PLACES — PENALTY.) No person shall be excluded on account of race, color, religion, or national origin from full and equal enjoyment of any accommodation, advantage, or privilege

furnished by public conveyances, theaters, or other public places of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshment, entertainment, or accommodation. Any person violating any of the provisions of this section or aiding or inciting another person to do the same shall be guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment.

PUBLIC ACCOMMODATIONS

Definition—Oregon

Senate Bill 75 of the 1961 session of the Oregon legislature, approved March 12, 1961, extends that state's public accommodations statute to include places offering goods or services to the public. In the text which follows, new portions are in italics.

AN ACT Relating to discrimination on account of race, religion, color or national origin; amending ORS 30.675 and 659.010.

Be It Enacted by the People of the State of Oregon:

Section 1.. ORS 30.675 is amended to read as follows:

30.675. (1) A place of public accommodation, resort or amusement, subject to the exclusion in subsection (2) of this section, means:

(a) Any hotel, motel, motor court, trailer park or campground.

(b) Any place offering to the public food or drink for consumption on or off the premises.

(c) Any place offering to the public entertainment, recreation or amusement.

(d) *Any place offering to the public goods or services.*

(2) However, a place of public accommodation, resort or amusement does not include any institution, bona fide club or place of accom-

modation, resort or amusement, which is in its nature distinctly private.

Section 2. ORS 659.010 is amended to read: 659.010. As used in ORS 659.010 to 659.110, unless the context requires otherwise:

(1) "Bureau" means the Bureau of Labor.

(2) "Commissioner" means the Commissioner of the Bureau of Labor.

(3) "Employee" does not include any individual employed by his parents, spouse or child or in the domestic service of any person.

(4) "Employer" does not include a club exclusively social, or a fraternal, charitable, educational or religious association or corporation, if such a club, association or corporation is not organized for private profit, nor does it include any employer with less than six persons in his employ.

(5) "Employment agency" includes any person undertaking to procure employees or opportunities to work.

(6) "Labor organization" includes any organi-

zation which is constituted for the purpose, in whole or in part, of collective bargaining or in dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.

(7) "National origin" includes ancestry.

(8) "Person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers.

(9) "Unlawful employment practice" includes only those unlawful employment practices spec-

ified in ORS 659.030 and subsection (1) of ORS 659.026.

(10) "Unlawful practice" means any unlawful employment practice or any distinction, discrimination or restriction on account of race, religion, color or national origin made by any place of public accommodation, resort or amusement as defined in ORS 30.675 or by any person acting on behalf of any such place, or any violation of ORS 345.240, 659.033 or 659.037, *but does not include a refusal to furnish goods or services when the refusal is based on just cause.*

PUBLIC ACCOMMODATIONS

Housing, Commercial Premises—New York

Chapter 414 of the 1961 Acts of the New York legislature, approved February 22, 1961, extends that state's prohibition against discrimination in housing to include certain commercial premises, creates an exception for owner-occupied housing, and extends penalty provisions to include real estate agents and others concerned with the sale, renting or leasing of property. In the following text, material in *italics* is new law; material in brackets is old law to be omitted.

AN ACT To amend the executive law, in relation to the elimination and prevention of practices of discrimination because of race, creed, color or national origin, in housing accommodations and commercial space; and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two hundred ninety of the executive law, as last amended by chapter three hundred forty of the laws of nineteen hundred fifty-five, is hereby amended to read as follows:

§ 290. Purposes of article. This article shall be known as the "Law Against Discrimination". It shall be deemed an exercise of the police power of the state for the protection of the public welfare, health and peace of the people of this state, and in fulfillment of the provisions of the constitution of this state concerning civil rights; and the legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern, that

such discrimination *not only* threatens [not only] the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state *and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.* A state agency is hereby created with power to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement [and], in [publicly-assisted] housing accommodations *and in commercial space* because of race, creed, color or national origin, and to take other actions against discrimination because of race, creed, color or national origin, as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

§ 2. Subdivision twelve of section two hundred ninety-two of such law, as added by chapter five hundred sixty-three of the laws of nineteen hundred fifty-six, is hereby amended to read as follows:

12. The term "multiple dwelling", as herein used, means a dwelling which is occupied, as a rule, for permanent residence purposes and

which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. In computing the number of families within a dwelling for the purposes of paragraph (a) of subdivision five of section two hundred ninety-six, there shall be excluded any residence or home in the dwelling which is occupied by the family of the owner of the dwelling. A "multiple dwelling" shall not be deemed to include a hospital, convent, monastery, asylum or public institution, or a fireproof building used wholly for commercial purposes except for not more than one janitor's apartment and not more than one penthouse occupied by not more than two families. The term "family", as used herein, means either a person occupying a dwelling and maintaining a household, with not more than four boarders, roomers or lodgers, or two or more persons occupying a dwelling, living together and maintaining a common household, with not more than four boarders, roomers or lodgers. A "boarder," "roomer" or "lodger" residing with a family means a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.

§ 3. Section two hundred ninety-two of such law is hereby amended by adding thereto three new subdivisions, to be subdivisions thirteen, fourteen and fifteen, to read as follows:

13. The term "commercial space" means any space in a building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied for the manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property; and any space which is used or occupied, or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in any building, structure or portion thereof.

14. The term "real estate broker" means any person, firm or corporation who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates, or offers or attempts to negotiate, a loan secured or to be secured by a

mortgage or other incumbrance upon or transfer of real estate. In the sale of lots pursuant to the provisions of article nine-a of the real property law, the term "real estate broker" shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.

15. The term "real estate salesman" means a person employed by a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate, or to lease or rent or offer to lease, rent or place for rent any real estate, or who collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker.

§ 4. Subdivision five of section two hundred ninety-six of such law, as thus renumbered by chapter nine hundred sixty of the laws of nineteen hundred fifty-eight, is hereby renumbered subdivision six and a new subdivision five is hereby added, to read as follows:

5. (a) Except as provided in paragraph (e) of this subdivision, it shall be an unlawful discriminatory practice for the owner, lessee, sublessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, which is located in a multiple dwelling or a housing accommodation, constructed or to be constructed, which is among ten or more housing accommodations, constructed or to be constructed, located on land that is contiguous (exclusive of public streets) and which is offered for sale or rent by a person who owns or has owned or otherwise controls or has controlled the sale or rental of such ten or more housing accommodations or any agent or employee thereof:

(1) To refuse to sell, rent, lease or otherwise to deny to or withhold from any person or group of persons such a housing accommodation because of the race, creed, color or national origin of such person or persons.

(2) To discriminate against any person because of his race, creed, color or national origin in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such a housing accommodation or to make any record or inquiry in connection with the prospective purchase, rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin, or any intent to make any such limitation, specification or discrimination.

The provisions of this paragraph (a) shall apply to the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, a parcel of land on which such person has commenced the building of any housing accommodation and with respect to which he has evidenced the intent to construct thereon ten or more housing accommodations.

(b) Except as provided in paragraph (e) of this subdivision, it shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent or lease, commercial space:

(1) To refuse to sell, rent, lease or otherwise deny to or withhold from any person or group of persons such commercial space because of the race, creed, color or national origin of such person or persons.

(2) To discriminate against any person because of his race, creed, color or national origin in the terms, conditions or privileges of the sale, rental or lease of any such commercial space or in the furnishing of facilities or services in connection therewith.

(3) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of such commercial space or to make any record or inquiry in connection with the prospective purchase,

rental or lease of such commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin, or any intent to make any such limitation, specification or discrimination.

(c) Except as provided in paragraph (e) of this subdivision, it shall be an unlawful discriminatory practice for any real estate broker, real estate salesman or employee or agent thereof:

(1) To refuse to sell, rent or lease any housing accommodation or commercial space covered by section two hundred ninety-six of this article to any person or group of persons or to refuse to negotiate for the sale, rental or lease, of any such housing accommodation or commercial space to any person or group of persons because of the race, creed, color or national origin of such person or persons, or to represent that such housing accommodation or commercial space is not available for inspection, sale, rental or lease when in fact it is so available, or otherwise to deny or withhold any such housing accommodation or commercial space or any facilities of such housing accommodation or commercial space from any person or group of persons because of the race, creed, color or national origin of such person or persons.

(2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for the purchase, rental or lease of any housing accommodation or commercial space or to make any record or inquiry in connection with the prospective purchase, rental or lease of any housing accommodation or commercial space which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin, or any intent to make any such limitation, specification or discrimination.

(d) Except as provided in paragraph (e) of this subdivision, it shall be an unlawful discriminatory practice for any person, bank, trust company, private banker, savings bank, industrial bank, savings and loan association, credit union, investment company, mortgage company, insurance company or other financial institution or lender, doing business in the state, and if incorporated, regardless of whether incorporated under the laws of this state, the United States

or any other jurisdiction, to whom application is made for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or commercial space, or any officer, agent or employee thereof:

(1) To discriminate against any such applicant or applicants because of the race, creed, color or national origin of such applicant or applicants or of any member, stockholder, director, officer or employee of such applicant or applicants, or of the prospective occupants or tenants of such housing accommodation or commercial space, in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such financial assistance.

(2) To use any form of application for such financial assistance or to make any record or inquiry in connection with applications for such financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin.

(e) Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or denominational organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

§ 5. Section two hundred ninety-seven of such law, as last amended by chapter nine hundred seventy-eight of the laws of nineteen hundred sixty, is hereby amended to read as follows:

§ 297. Procedure. Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The industrial commissioner or attorney-

general may, in like manner, make, sign and file such complaint. In connection with the filing of such complaint, the attorney-general is authorized to take proof in the manner provided in section four hundred six of the civil practice act. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this article, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors. Whenever a complaint is filed, pursuant to subdivision five (d) of section two hundred ninety-six of this article, no member of the commission nor any member of the commission staff shall make public in any manner whatsoever the name of any borrower or identify by a specific description the collateral for any loan to such borrower except when ordered to do so by a court of competent jurisdiction or where the express permission has been first obtained in writing from the lender and the borrower to such publication; provided, however, that the name of any borrower and a specific description of the collateral for any loan to such borrower may, if otherwise relevant, be introduced in evidence in any hearing before the commission or any review by a court of competent jurisdiction of any order or decision by the commission. In case of failure so to eliminate such practice, or in advance thereof if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before three members of the commission, sitting as the commission, at a time and

place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it. The case in support of the complaint shall be presented before the commission by one of its attorneys or agents, and the commissioner who shall have previously made the investigation and caused the notice to be issued shall not participate in the hearing except as a witness, nor shall he participate in the deliberation of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken at the hearing shall be under oath and be transcribed. If, upon all the evidence at the hearing the commission shall find that a respondent has engaged in any unlawful discriminatory practice as defined in this article, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, or the extension of full, equal and unsegregated accom-

modations, advantages, facilities and privileges to all persons, as, in the judgment of the commission, will effectuate the purposes of this article, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful discriminatory practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of its order shall be delivered in all cases to the industrial commissioner, the attorney general, and such other public officers as the commission deems proper. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination.

§ 6. The sum of one hundred thousand dollars (\$100,000), or so much thereof as may be necessary, is hereby appropriated for the fiscal year beginning April first, nineteen hundred sixty-one to the state commission against discrimination in the executive department from any monies in the state treasury in the general fund to the credit of the state purposes fund, not otherwise appropriated, for the purposes set forth in this act, including personal service and travel in and outside the state and other necessary expenses, payable on the audit and warrant of the comptroller on vouchers certified or approved by the chairman of the commission or by an officer or employee of the commission designated by the chairman.

§ 7. This act shall take effect September first, nineteen hundred sixty-one.

PUBLIC ACCOMMODATIONS Anti-Discrimination Law—Wyoming

Chapter 103 of the 1961 Acts of the Wyoming legislature, approved February 16, 1961, prohibits and provides penalties for the refusal to permit access to facilities which are "public in nature" or which "invite the patronage of the public", because of race, religion, color or national origin.

AN ACT to prohibit distinction, discrimination or restriction because of race, religion, color or national origin, providing for a penalty.

Be it enacted by the Legislature of the state of Wyoming.

Section 1. All persons of good deportment within the jurisdiction of this state shall be entitled to the full and equal enjoyment of all accommodations, advantages, facilities and privileges of all places or agencies which are public

in nature, or which invite the patronage of the public, without any distinction, discrimination or restriction on account of race, religion, color, or national origin.

Section 2. Any person who shall wilfully violate any of the provisions of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than One Hundred Dollars (\$100.00) or imprisoned in the county jail for a term not to exceed ninety (90) days, or both.

ADMINISTRATIVE AGENCIES

BIRTH CERTIFICATES

Designation by Race—Maryland

The Maryland Department of Health has ordered the removal of race identification from the part of birth certificates copied for certification. The race information is still available, however, for statistical purposes. Following is a quotation from the Maryland State Board of Health statement dated February 17, 1960:

"Location Of Race Item On Birth Certificate: Dr. Davens advised that careful consideration has been given to transferring the item of race from the face of the birth certificate to the confidential medical data section. New York City has done this and Baltimore City has agreed to do so and there seems to be no disadvantage since the information for statistical purposes will still be available. (In addition, several spokesmen for the negro community have requested this from time to time.) On the basis of these

considerations, he recommended that the race item be removed from the body of the birth certificate and incorporated in the confidential medical section of the birth certificate. After due consideration, upon motion of Dr. Young, seconded by Dr. Deitz, and duly carried, Dr. Davens' recommendation was approved on a Statewide basis, effective January 1, 1962, with the proviso that all data derived from the birth certificates for statistical purposes will continue to be available on a race basis."

EMPLOYMENT

Discrimination—Federal Contracts

The Secretary of Defense on March 24, 1961, directed all officials in his department to re-examine existing programs and practices in order to implement a program of employment "based solely on merit and fitness without regard to race, color, religion or national origin." The action was taken in response to the President's Executive Order 10925 [6 Race Rel. L. Rep. 9 (1961)].

THE SECRETARY OF DEFENSE
Washington

March 24, 1961

MEMORANDUM FOR THE SECRETARIES OF THE
MILITARY DEPARTMENTS

THE DIRECTOR, DDR&E
THE CHAIRMAN, JCS
THE ASSISTANT SECRETARIES OF DEFENSE
THE GENERAL COUNSEL
THE ASSISTANT TO THE SECRETARY OF DEFENSE

THE DIRECTOR, NATIONAL SECURITY AGENCY
THE CHIEF, DEFENSE ATOMIC SUPPORT AGENCY
THE CHIEF, DEFENSE COMMUNICATIONS
AGENCY

SUBJECT: Non-Discrimination in Employment

President Kennedy's recent Executive Order 10925 on equality of employment opportunity is a signal for all of us to intensify our efforts in this field.

Although progress has been made in this

field within the Department of Defense, much work still remains to be done. This effort will require continuing vigilant appraisals of personnel actions, as well as effective programs of education and publicity. Personnel actions and employment practices must be based solely on merit and fitness without regard to race, color, religion or national origin.

As an immediate step, existing programs and practices will be reexamined in order to assure full compliance with the basic policy. This review will include appropriate steps to assure that

- a. Opportunity to participate in Department of Defense training programs is made available to every employee who can meet the established standards, and
- b. Negro institutions are fully informed of employment opportunities within the Department of Defense and are included in visits to schools and colleges in connection with recruitment activities.

It is also desired that the attached memorandum be distributed.

/s/ ROBERT S. McNAMARA
Secretary of Defense

THE SECRETARY OF DEFENSE
Washington

March 24, 1961

MEMORANDUM FOR ALL EMPLOYEES

SUBJECT: Non-Discrimination in Employment
President Kennedy, in announcing recently his program of equal opportunity in employment for all citizens, said:

"I have dedicated my Administration to the cause of equal opportunity in employment by the government . . . I have no doubt that the vigorous enforcement of this

order will mean the end of such discrimination."

This principle of equal opportunity without regard to race, creed, color, or national origin is the firm policy of the Department of Defense. It is a policy to which I shall give continuing and positive emphasis.

I am aware that progress has been made within the Department of Defense toward achieving the objective of this policy. However, much work still remains to be done to assure full equality of opportunity.

It is the obligation of all of us in the Department to see that there are no barriers in the way of achieving this objective. We must take steps to assure that personnel actions are based solely on merit and fitness, and that members of minority groups are aware of employment, promotion and training opportunities.

The Department of Defense, as the largest employer of civilians, must conform fully with the letter and spirit of the non-discrimination policy. I am counting on all of you — officials, supervisors and employees — to give full support and cooperation to the President's program.

/s/ ROBERT S. McNAMARA
Secretary of Defense

In memorandum dated May 15th, Secretary McNamara, in the interest of clarification revised sub-paragraph "b" of multiple addressee memorandum of March 24th to read as follows:

"b. All academic institutions, including Negro colleges and universities, are fully informed of employment opportunities within the Department of Defense and are included in visits to schools and colleges in connection with recruitment activities."

GOVERNMENTAL FACILITIES Parks—Federal

The Secretary of the Interior has issued a regulation prohibiting discrimination because of race, creed, color, ancestry or national origin, against prospective patrons or employees

by operators of any public facility or accommodation in a federal park area. The publicizing of the facilities in such a manner as to indicate that any person might not be welcome because of his race, creed, color, ancestry or national origin is also prohibited.

On page 2469 of the FEDERAL REGISTER of March 23, 1961, there was published a notice and text of a proposed amendment to § 3.46 of Title 36, Code of Federal Regulations. The purpose of this amendment is to conform to present policy requirements of the Federal Government that persons entering into contracts with the United States for the use of public property shall not maintain discriminatory employment practices with respect to race, color, creed, ancestry, or national origin.

Interested persons were given thirty days within which to submit written comments, suggestions or objections with respect to the proposed amendment. As the result of comments received within the 30-day period, which were carefully considered, the proposed regulation is hereby adopted with the following changes and is set forth below.

1. In paragraph (a) the word "ancestry" is inserted between the words "color" and "or".

2. In paragraph (b) the word "ancestry" is inserted between the words "color" and "or".

3. In paragraph (c) the word "ancestry" is inserted between the words "color" and "or".

This amendment shall become effective at the beginning of the 30th calendar day following the date of this publication in the FEDERAL REGISTER.

(Sec. 3, 39 Stat. 535; 16 U.S.C. 3)

Section 3.46 is amended to read as follows:

§ 3.46 Discrimination in furnishing public accommodations, in using park areas, and employment practices in park areas.

The operator of any public facility or accommodation in a park area and its employees, including, but not limited to, the District of Columbia Recreation Board and its personnel, the District of Columbia Armory Board and its personnel, and any subcontractor or sublessee, while using park areas are prohibited from (a) publicizing the facilities, accommodations or any activity conducted therein in any manner that would directly or inferentially reflect upon or question the acceptability of any person or persons because of race, creed, color, ancestry, or national origin; (b) discriminating by segregation or otherwise against any person or persons because of race, creed, color, ancestry, or national origin by refusing to furnish such person or persons any accommodation, facility, service or privilege offered to or enjoyed by the general public; and (c) discriminating against any employee or applicant for employment because of race, creed, color, ancestry, or national origin in connection with any activity provided for or permitted by its contract, subcontract, lease, sublease, or permit. The aforesaid provision (c) shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoffs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Stewart L. Udall,
Secretary of the Interior.

May 15, 1961.

INDIANS

Supervision—Federal Laws

On April 26, 1961, the Secretary of the Interior terminated the trust under which the United States held the property of the Menominee Tribe, and proclaimed an end to federal services which had heretofore been performed because of the Menominees' status as Indians. The laws of the several states were declared applicable to the members of the tribe on the same basis as to

other persons living within the jurisdiction. (A "Plan for the Future Control of Menominee Indian Tribal Property and Future Service Functions" was also published, which includes the establishment of a corporation for the exploitation of the property, and provision for individual use of tracts.) The Secretary's proclamation is printed below.

Pursuant to the authority contained in section 10 of the Act of June 17, 1954 (Pub. Law 83-399; 68 Stat. 250), it is hereby proclaimed that the title to all property, real and personal, held in trust by the United States for the Menominee Tribe has been transferred in accordance with section 8 of the Act of June 17, 1954, *supra*, and that effective midnight April 30, 1961, individual members of the Menominee Tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians; all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the Menominee Tribe; and the laws

of the several States shall apply to the Menominee Tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

As required by section 7 of the Act of June 17, 1954, *supra*, the PLAN FOR THE FUTURE CONTROL OF MENOMINEE INDIAN TRIBAL PROPERTY AND FUTURE SERVICE FUNCTIONS is published and appears immediately below this notice.

s/ Stewart L. Udall
Secretary of the Interior

April 26, 1961

LICENSING AGENCIES

Race in Application Blanks—California

The director of the California Department of Professional and Vocational Standards has advised agencies in that department to delete questions as to race and place of birth from application forms and fingerprint cards.

Circular Letter No. 45-60

DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS

November 1, 1960

TO: EXECUTIVE OFFICERS, REGISTRARS, AND
CHIEFS OF BUREAUS

SUBJECT: FORMS WHICH CONTAIN QUESTIONS
CONCERNING RACE AND PLACE OF BIRTH.

The Attorney General's Office has recently advised the Real Estate Commissioner that the use of application forms and fingerprint cards which require applicants for real estate broker's licenses to designate their race and place of birth violate State statutes which prohibit the State and its

agencies from including questions of this kind in applications and other forms required to be submitted to them.

I believe this conclusion applies with equal force to this department and its constituent agencies.

Your cooperation is therefore requested in seeing that any questions pertaining to race and place of birth which may now appear on your application forms or fingerprint cards are blocked out or otherwise deleted at your earliest opportunity and that future forms eliminate any such questions.

Your assistance in this regard will be appreciated.

VINCENT S. DALSIMER
Director

ATTORNEYS GENERAL

CIVIL RIGHTS COMMISSION Questionnaires—Louisiana

The attorney general of Louisiana has advised state officials that the various local committees of the United States Civil Rights Commission have only advisory functions, and cannot compel the supplying of information about interracial relationships in the state government. Specifically, he advised that questionnaires promulgated by the chairman of the state committee need not be completed.

April 13, 1961

Honorable Rufus D. Hayes
Commissioner of Insurance
Capitol
Baton Rouge, Louisiana

Dear Mr. Hayes:

Receipt of your letter of March 20 is acknowledged.

On March 16, 1961, the Louisiana Advisory Committee to the United States Commission on Civil Rights, over the signature of its Chairman, Mr. J. D. DeBlieux, mailed a questionnaire to many public officials, heads of departments, etc., of the State Government, and asked therein that the questionnaire be filled out and returned. The stated purpose of the questionnaire is a study of the federal relationship to employment, the questionnaire being a method used by the Advisory Committee in assisting the Commission on fact gathering relating to public employment in this State.

We have been asked by many officials who have received the questionnaire whether they are required to answer the same under some compulsory provision of law, or if their treatment of the document is voluntary on their part.

The Louisiana Advisory Committee to the United States Commission on Civil Rights is authorized by the Civil Rights Act of 1957, 42 U.S.C. 1975-1975(e), and particularly by Section 1975(d)(c), which reads as follows:

"The Commission may constitute such advisory committees within states, composed

of citizens of that state, and may consult with governors, attorneys general, and other representatives of state and local governments and private organizations, as it deems advisable."

This is the sole and only reference to such advisory committees within the respective states found in the Civil Rights Act. Nowhere in said Act are the duties, powers, authority or functions of said advisory committees defined, set forth or described. In the case of *Hannah v. Larche*, decided June 20, 1960, 80 S. Ct. 1502, Chief Justice Warren, in a majority opinion, described and ascertained both the nature and function of the Civil Rights Commission as follows:

"Section 104 of the Civil Rights Act of 1957 specifies the duties to be performed by the Commission. Those duties consist of (1) investigating written sworn allegations that anyone has been discriminatorily deprived of his right to vote; (2) studying and collecting information concerning legal developments constituting a denial of equal protection of law under the constitution; and (3) reporting to the President and Congress on its activities, findings and recommendations. As is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact finding."

Under other provisions of this Act and particularly, Section 105(f) (U.S.C. 42, Sec. 1975(d)(f)), the Commission, or on the au-

thorization of the Commission, any sub-committee of any two or more members, at least one of whom shall be of each major political party, may for the purpose of carrying out the provisions of this Act, hold such hearings and act at such times and places as the Commission or such authorized sub-committee may deem advisable. Subpoenas for the attendance and testimony of witnesses, *or the production of written or other matter*, may be issued in accordance with the rules of the Commission as contained in Section 102(j) and (k) of this Act, over the signature of the Chairman of the Commission or of such sub-committee and may be served by any person designated by such chairman.

Sections 102 (j) and (k) above referred to relate to witness fees and the restriction on the issuance of subpoenas, neither of which sections is pertinent to the problem under consideration.

The description of the Commission's power, as outlined by Chief Justice Warren in the Hannah case, *supra*, in our opinion limits the authority of the Commission to the use of subpoenas for testimony of witnesses or the production of written or other matter, and requires the conclusion that this power is reserved to the Commission itself or its duly authorized sub-committee in the conduct of a hearing duly provoked by said Commission in the discharge of its duty to study and collect information concerning the legal developments constituting a denial of equal protection of the law under the Constitution.

In the case at hand there has been no hearing called, no subpoena issued or served over the signature of the Chairman of the Commission or the Chairman of a sub-committee of the Commission, duly constituted as such. It is merely a request for information by the Chairman of a State Advisory Committee to the Civil Rights Commission. Had the Congress intended such Advisory Committee to have the power to require the production of written or other matter, it is our belief that it would have so stated. The mere mention of the right of the Commission to appoint State Advisory Committees, without specifically providing the powers and duties of such Advisory Committees, compels us to the conclusion that it was the intention of Congress that such committees were to be *advisory* and nothing more. There being nothing in the Act permitting or authorizing such Advisory Committees to require the production of written or other matter, we are of the opinion that the public officials, heads of departments, etc., of the State Government who received a questionnaire from the Chairman of the Louisiana Advisory Committee to the United States Commission on Civil Rights are not required to complete and answer said questionnaire by the Civil Rights Act, and that any decision on the part of an official to comply with the request would be voluntary on his part.

Sincerely yours,

Jack P. F. Gremillion
Attorney General

ELECTIONS

Voting—Louisiana

The attorney general of Louisiana has ruled that illiterate persons may not vote an absentee ballot under Act 254 of the 1960 Acts of the Louisiana legislature, since no provision is made for assisting them. However, physically disabled persons were declared eligible, since specific provision for them is made in the act.

March 22, 1961

Honorable M. A. Barras
Clerk of Court, St. Martin Parish
St. Martinville, Louisiana

Dear Mr. Barras:

I have your letter of March 21, in which you ask the following questions:

- "1. (a) Can an illiterate elector, who was registered prior to November 8, 1960, vote absentee?
(b) If he can vote, what assistance can be given this elector?
- "2. (a) Can a physically incapacitated qualified elector, who cannot sign his name, vote absentee?

- (b) If he is able to vote, what evidence of disability does he have to present to the Clerk of Court in order to obtain a ballot?
 (c) What assistance can the elector receive from the Clerk of Court?"

Act 254 of the Legislature of 1960 contains the more recent amendments relating to the questions propounded by you and said Act, in Section 1 thereof amending Section 258 of Title 18 of the Louisiana Revised Statutes of 1950, states:

"Absentee voting in elections held under the provisions of this Part shall be in accordance with the provisions of Chapter 4 of Title 18 of the Louisiana Revised Statutes of 1950."

Thereafter, Section 2 of said Act goes on to amend Title 18, Sections 1071 to 1081, inclusive, relating to the rules and regulations of casting absentee votes in primary, special and general elections. R. S. 18:1071 provides in part,

"Any registered voter otherwise qualified to vote in any primary, special or general election to be held in this state or in any municipality or any other political subdivision of the state who is or who expects to be absent for any reason whatsoever from the state of Louisiana (if application is made by mail) or the parish in which he is qualified to vote (if application is made in person) at the time of the election may vote in the election by complying with this Part; . . ."

Thereafter, the various sections of this statute detail the method by which the eligible registered voter shall mark his ballot, sign certain affidavits, have the affidavits attested to by the Clerk of Court, etc., and all these rules and regulatory provisions require the actual marking of the ballot and the signing of the certifications by the voter. The single exception to these rules is provided for in R. S. 18:1074, as follows:

"If an elector voting under this Part is unable to mark or stamp his ballot or actually sign any certificate or affidavit herein provided because of physical disability or blindness, the attesting officer may assist the voter in preparing his ballot and may write the voter's name to the certificate or affidavit. This inability to mark the ballot and sign one's name shall be certified to by the officer in substantially the following form:

"I certify that _____ appeared before me, the undersigned officer, to prepare the ballot with which this certificate is enclosed; that he was unable to sign his name because of physical disability or blindness, and that I assisted him in preparing the ballot as directed by him and signed his name to the affidavit appearing on the envelope. I further swear that the affiant was not solicited or advised by me to vote for or against any candidate or issue in the election. This the _____ day of _____, 19____."

Therefore, we are of the opinion that an illiterate elector who was registered prior to November 8, 1960, cannot vote an absentee ballot since he would be unable to comply with the provisions of the law and no provision for his assistance is made in the statute. We are further of the opinion that a physically incapacitated qualified elector, who cannot sign his name, may vote under the provisions hereinbefore quoted; that he need only satisfy the Clerk of Court or his Deputy as to his disability within the sound discretion of said Clerk or his qualified Deputy, and that the Clerk may assist him by preparing the ballot and writing the voter's name to the certificate or affidavit in order to perfect his vote.

Sincerely yours,

Harry J. Kron, Jr.

Assistant Attorney General

LICENSING AGENCIES

Race in Application Forms—California

The Attorney General of California has advised the agency which licenses that state's real estate brokers that it is unlawful to inquire into an applicant's race and place of birth. Subsequently, the director of the State Department of Professional and Vocational Standards advised all of its agencies to delete similar questions from application forms and fingerprint cards.

Mr. Donald McClure
Assistant Commissioner
Division of Real Estate
Department of Investment
1015 L Street, Mull Building
Sacramento, California

October 19, 1960

This is to confirm our telephone conversation of yesterday afternoon regarding your inter-departmental communication of April 18 inquiring as to whether the Real Estate Commissioner should strike from the application for a real estate broker's license question No. 9c inquiring as to "place of birth", and the word "race" required of applicants on fingerprint cards. You have informed me that the Real Estate Commissioner already has taken action to delete the term "Place of Birth" from the application

forms and thus your remaining question relates solely as to the propriety of deleting the word "race" from the fingerprint cards.

As I indicated to you this office had previously analyzed this same problem with respect to the inclusion of the terms "race" and "Place of Birth" on the fingerprint cards required for applicants for teaching credentials and we advised the appropriate agencies that these terms should be deleted from their fingerprint cards. A copy of this memorandum dated March 18, 1960, is attached for your information. I am of the opinion that the views expressed in that memorandum apply equally to the fingerprint cards required of applicants for licenses as real estate brokers.

RICHARD L. MAYERS
Deputy Attorney General

PUBLIC ACCOMMODATIONS

Liquor Licensees—California

The Attorney General and the Director of Alcoholic Beverage Control of California have issued instructions that beverage licensees who discriminate against customers on a racial basis may be subjected to disciplinary action. Following is a press release in which this policy was announced:

Attorney General Stanley Mosk and Director of Alcoholic Beverage Control Malcolm Harris announced today that any alcoholic beverage licensee who practices racial discrimination at his place of business may be subject to disciplinary action.

According to Harris, this decision was reached following consultation with Mr. Franklin Williams, head of the Constitutional Rights Section of the Attorney General's office. Harris said it is in line with Governor Edmund G. Brown's policy of fair and equal treatment for all citizens of California.

The Director of Alcoholic Beverage Control is advising each licensee of this policy by forwarding the following statement with all licenses when they are renewed in January or July of 1960:

"Section 51, California Civil Code, reads in part as follows:

'All citizens within the jurisdiction of this state are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facil-

ities, privileges, or services in all business establishments of every kind whatsoever.

"A licensee of the Department of Alcoholic Beverage Control who permits any discrimination, distinction, or restriction at the licensed premises on account of color, race, religion, ancestry or national origin, contrary to the provisions of Section 51, may be subject to disciplinary action."

Harris stated that he has been advised by Assistant Attorney General Franklin Williams that the full facilities of the Attorney General's Office would be available for any legal assistance required by the Department of Alcoholic Beverage Control in prosecuting violations of the above section.

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Table of Subsequent Disposition of Cases

The references below are to the subsequent disposition of cases in which reports of earlier proceedings were printed in the *Race Relations Law Reporter*, and in which no race relations factors were discussed in the later opinions here cited.

Air Line Pilots Assn. Internat'l v Quesada, 81 S.Ct. 1923 (1961); previous proceedings reported at 5 Race Rel. L. Rep. 749, 6 Race Rel. L. Rep. 368.

Dinkins v Rogers, 81 S.Ct. 1085 (1961); previous proceedings reported at 5 Race Rel. L. Rep. 766; 6 Race Rel. L. Rep. 368.

Gallion v Rogers, 81 S.Ct. 1086 (1961); previous proceedings reported at 5 Race Rel. L. Rep. 766, 6 Race Rel. L. Rep. 368.

Goldsby v State, 129 So.2d 127 (Miss Sup Ct,

1961); previous proceedings reported at 5 Race Rel. L. Rep. 988 and 1169.

Highlander Folk School v State ex rel. Sloan, 345 S.W.2d 677 (Tenn Sup Ct, 1961); previous proceedings reported at 5 Race Rel. L. Rep. 91.

In the Matter of American Jewish Congress v Carter et al., 173 N.E.2d 788 (NY Ct App, 1961); previous proceedings reported at 5 Race Rel. L. Rep. 426.

Williams v Moore, 81 S.Ct. 1674 (1961); previous proceedings reported at 5 Race Rel. L. Rep. 507, 988; 6 Race Rel. L. Rep. 368.





